Petition

81-1502

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No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

EDWARD L. MURNANE, *Petitioner*,

v.

AMERICAN AIRLINES, INC., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

EUGENE R. FIDELL*
MICHAEL F. MCBRIDE
LEBOEUF, LAMB, LEIBY & MACRAE
Suite 1100
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 457-7500
Attorneys for Petitioner

**Counsel of Record.*

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QUESTIONS PRESENTED

1. Under the Age Discrimination in Employment Act, may a court hold that age less than 40 is a bona fide occupational qualification for hiring airline cockpit personnel without requiring the employer to prove that there is a factual basis for believing that all or substantially all persons within the class would be unable to perform safely and efficiently the duties of the job involved?

2. Where an employer contends that a *qualified* applicant would not have been hired in any event, may it (a) fail to consider that person on the basis of the standards actually applied to other applicants, and (b) rely entirely on evidence of events that take place or become known only after the discriminatory rejection?

PARTIES

The parties in the Court of Appeals were Edward L. Murnane, the Equal Employment Opportunity Commission ("EEOC") and American Airlines, Inc. The Secretary of Labor was a plaintiff-intervenor in the District Court. The EEOC was substituted for the Secretary following entry of judgment in that court, pursuant to Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (1978).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Edward L. Murnane petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals, per Judge Gordon of the Western District of Kentucky, sitting by designation, is reported at 27 Empl. Prac. Dec. ¶ 32,178, 26 Fair Empl. Prac. Cas. 1537, and appears at Pet. App. 1a. The decisions of the United States District Court for the District of Columbia, Richey, J., are reported at 482 F. Supp. 135 & 151, 21 Empl. Prac. Dec. ¶¶ 30,436 and 30,489, 21 Fair Empl. Prac. Cas. 284, 26 Fair Empl. Prac. Cas. ¶ 1535, 15 Av. Cas. 17,825, and appear at Pet. App. 16a and 43a.

JURISDICTION

The decision of the Court of Appeals was entered October 1, 1981. Timely petitions for rehearing and suggestions for re-

hearing *en banc* filed by Mr. Murnane and the EEOC were denied by orders entered on November 19, 1981, which appear at Pet. App. 11a and 12a. This Court has jurisdiction to review the decision below under 28 U.S.C. § 1254(1) (1976).

STATUTES INVOLVED

Section 4(a)(1) of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 623(a)(1) (1976), provides:

> It shall be unlawful for an employer — (1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. . . .

Section 4(f)(1), 29 U.S.C. § 623(f)(1) (1976 & Supp. III 1979), provides:

> It shall not be unlawful for an employer, employment agency, or labor organization —
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age. . . .

STATEMENT OF THE CASE

On April 1, 1976, Edward L. Murnane, age 43, and approaching the conclusion of a twenty-year career as an active duty pilot with the United States Coast Guard and Navy, applied to American Airlines, Inc. ("American") for a job as a flight officer. "Flight officer" is American's term for the flight engineer, the person holding the junior "third seat" in the cockpit. When he applied, Mr. Murnane had 7,340 hours of flight time, including substantial experience in many types of aircraft — both fixed-wing and helicopter, piston and jet. He

was and is a member of the protected class under the ADEA. 29 U.S.C. § 631(a) (Supp. III 1979).

Mr. Murnane met or exceeded all of American's stated qualifications, Pet. App. 19a, 26a, but American neither interviewed nor examined him. Pet. App. 3a. Based solely on his application, the airline rejected him, although it did not tell him so. Not having advised him of the rejection, the airline at that time gave no reasons for its action. Much later, its house counsel for employment discrimination matters told the California Fair Employment Practice Commission ("FEPC") — to which Mr. Murnane initially complained — that it had rejected him because he lacked "competitive qualifications" in that his fixed-wing "annual flying experience [was] not competitive with that of other applicants. . . ." Pet. App. 48a. Throughout the trial below, American denied that it had rejected Mr. Murnane.

The District Court held that American's contention that it had not rejected Mr. Murnane was "frivolous and merely a futile semantic exercise on American's part." Pet. App. 21a. The District Court found that American in fact hires pilot applicants based on total flight time, Pet. App. 27a-28a, as to which Mr. Murnane's qualifications were clearly superior, *id.*, rather than "annual flying experience." The asserted lack of "competitive qualifications" was therefore a pretext, and not the true reason for Mr. Murnane's rejection. *See Nanty* v. *Barrows Co.*, 660 F.2d 1327, 1332 (9th Cir. 1981).

Specifically, the District Court found

> that American has continued to hire applicants, of similar or lesser qualifications than the plaintiff's since the time of plaintiff's application. Since April 1, 1976, when plaintiff filed his application, American has hired 443 pilots. All of these pilots were under the age of thirty-five and outside the protected class under the Act. Many of these successful applicants were less qualified than the plaintiff in terms of

> total flying experience, which American propounds as the major factor in determining selection for the position of Flight Officer.
>
> It is clear, therefore, that plaintiff has successfully met his initial burden of making out a *prima facie* case of age discrimination. Pet. App. 27a-28a.

The true reason Mr. Murnane was rejected was his age, and American did not dispute this on appeal.

At this stage of the litigation, Mr. Murnane sought only to be *considered* for the flight officer position. Pet. App. 17a. The District Court concluded, however, that American was entitled to judgment because (1) age less than 40 is a "bona fide occupational qualification" ("bfoq") for the flight officer position, 29 U.S.C. § 623(f)(1) (1976 & Supp. III 1979), and (2) Mr. Murnane would not have been hired in any event. All relief, including backpay, was denied. The Court of Appeals affirmed.

1. *The bfoq defense*. The District Court held that a flight officer hiring age less than 40 is a bfoq reasonably necessary for the normal operation of American's business. Pet. App. 28a-35a. The District Court did not evaluate whether persons over 40 (especially those with twenty years' prior experience as pilots) could perform safely as flight officers, the job here in question, nor did it evaluate the practicability of making individualized determinations. Rather, the court accepted American's claim that it had to hire young flight officers so that its *captains* could serve as such for as long as possible. American's theory was that the safest *captain* is the one who has been a captain at American the longest. Pet. App. 34a. [1] This theory was advanced by way of management opinion. American admitted that it neither possessed nor knew of any documents,

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[1] Had Mr. Murnane been hired when he applied at age 43, he could have flown for American for seventeen years, progressed to captain, and served as such for several years. *See* Pet. App. 4a n.2, 5a.

studies, reports or investigations tending to support its contention that age under 40 is a bfoq for the flight officer position. Ex. Vol. I, 52. The only empirical data demonstrated simply that older pilots — of which American has many, and of which Mr. Murnane would be one — are *safer*. Ex. Vol. I, 12. The Federal Aviation Administration ("FAA"), which is responsible for the pervasive federal regulatory program designed to maximize aviation safety, does not require that flight officers be under 40 at the time of hire. American hired flight officers over that age when it acquired Trans Caribbean Airlines. J.A. 138.

Relying on the "minimal increase in risk of harm" test of *Hodgson* v. *Greyhound Lines, Inc.*, 499 F.2d 859, 863 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975), rather than the two-pronged test of *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), and *Arritt* v. *Grisell*, 567 F.2d 1267 (4th Cir. 1977),[2] the Court of Appeals affirmed the District Court's approval of American's policy because it "might result in the death of one less person." Pet. App. 8a, 33a. The Court of Appeals observed that "[c]ourts, in our view, do not possess the expertise with which, in a cause presenting safety as the critical element, to supplant their judgments for those of the employer." Pet. App. 7a. The Court of Appeals did *not* find that there is a factual basis for concluding that all or substantially all persons within the class would be unable to perform safely and efficiently the duties of the job involved.

2. *The "competitive qualifications" defense*. After Mr. Murnane proved that he met American's stated qualifications

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[2] "[T]he burden is on the employer to show (1) that the bfoq which it invokes is reasonably necessary to the essence of its business . . . and (2) that the employer has reasonable cause, i.e., a factual basis for believing that all or substantially all persons within the class . . . would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis." 567 F.2d at 1271 (footnote omitted).

and that American discriminated against him, American articulated several theories in an unsuccessful effort to show either that he was not rejected or that he was rejected for reasons other than his age. These theories were disposed of by cross-examination and an analysis of the aviation experience of the persons American did hire as shown on their "pilot supplement sheets." *E.g.*, Ex. Vol. I, 130-34.

American also endeavored to show that Mr. Murnane was entitled to no relief because he would not have been hired in any event. At this point the notion of "competitive qualifications," first used by American in its attorney's letter to the FEPC, again came into play. Despite the findings quoted on pages 3-4, *supra*, the District Court adopted American's claim that Mr. Murnane was never "competitively qualified" and therefore would not have been selected during the later stages of American's hiring process. That process includes two medical examinations, interviews, a psychological test, a verification of information contained in the written application, and a simulator evaluation ride. Pet. App. 36a. American never administered any of these tests to Mr. Murnane. The court concluded that Mr. Murnane would not have survived a selection process to which he was never subjected.

The court had before it Mr. Murnane's application form (the only information on which American based its rejection and its claim to the FEPC that he lacked "competitive qualifications") and the "pilot supplement sheets" of every flight officer American hired in preference to Mr. Murnane, all of whom were under age 40. Mr. Murnane's qualifications were substantially better than those of many of the successful younger applicants. *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). Judge Richey found that total flight time was "the major factor in determining selection for the position of flight officer." Pet. App. 28a. Mr. Murnane's total flight hours exceeded those of most of the successful applicants. To cite but one

example, one of those hired was a younger Coast Guard aviator whom Mr. Murnane had helped to train. Mr. Murnane was the superior candidate. He had approximately three times as many total flight hours and twice as many fixed-wing hours as the other Coastguardsman. J.A. 253-70.

Also before the District Court were Mr. Murnane's voluminous military service record and evidence relating to his performance in other jobs *after* American discriminatorily rejected his application. Mr. Murnane's 671-page service record included numerous laudatory comments on his flying ability. The Coast Guard's chief pilot testified that Mr. Murnane was a "very good aviator," based on his personal knowledge as well as a review of Mr. Murnane's fitness reports. J.A. 234-36. The service record contained isolated derogatory comments. These reports, prepared 6-8 *years* before the discrimination occurred, were shown at trial to have been made, for example, by a commanding officer who took a position contrary to Mr. Murnane for exercising independent judgment as president of an administrative discharge board. J.A. 133-36. Nonetheless, the District Court relied on the derogatory comments in Mr. Murnane's service record to conclude that he would not have been hired in any event. Pet. App. 39a-40a, 47a.

Mr. Murnane's service record was not requested by American when he applied or at any time prior to the commencement of this action. American first sought the service record in discovery. J.A. 130. American does not require applicants to submit such records, even though many successful applicants come from the armed forces. At no time did the airline produce or indicate that it had scrutinized the service record or its equivalent of any other person.

The alleged shortcomings in Mr. Murnane's post-discrimination performance came long after his rejection. Despite their remoteness in time from the rejection, and the fact that Mr. Murnane earned a Boeing 727 captain's license after those events, Pet. App. 40a, as well as his prior aviation

experience, often as pilot-in-command, with no accidents or violations, the District Court apparently relied on Mr. Murnane's post-discrimination performance to draw a retrospective inference that he must not have been "competitively qualified" when American rejected him. [3]

Notwithstanding the failure of the airline to subject Mr. Murnane to the tests normally administered to those who possess the basic qualifications to be a flight officer, the District Court concluded that there was "credible and persuasive evidence" that he was not "competitively qualified" for the job. Pet. App. 40a, 47a. The Court of Appeals agreed, Pet. App. 10a, but failed to indicate whether it was relying on the after-acquired prediscrimination evidence from Mr. Murnane's service record, post-discrimination events, or both. Since the Court of Appeals declined to clarify the matter in response to our petition for rehearing, we assume the court relied on both categories of evidence.

REASONS FOR GRANTING THE WRIT

The decision below directly conflicts with a decision of the Court of Appeals for the Fourth Circuit involving another airline's age limit for the same cockpit position. *Smallwood* v. *United Air Lines, Inc.*, 661 F.2d 303 (4th Cir. 1981). [4] Misapplying this Court's decision in *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977), the decision below adopts a novel standard for bfoqs that conflicts with the decisions of several Circuits and

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[3] While the case was pending in the Court of Appeals, Mr. Murnane earned a further FAA license to serve as captain of the Boeing 747. The Court of Appeals properly took judicial notice of that license in an order entered shortly after the oral argument, Pet. App. 14a, but did not refer to the license in its opinion. *See Massachusetts* v. *Westcott*, 431 U.S. 322, 323 n.2 (1977) (per curiam). The 727 and 747 are two of the four aircraft in American's fleet. J.A. 426.

[4] We are authorized to state that United Air Lines anticipates filing a petition for a writ of certiorari.

will affect cases arising under the ADEA in other industries as well as bfoq cases under other employment discrimination legislation. Because it sanctions the use of different evaluation standards than those "*actually applied*" to other applicants, the decision below fails to comply with *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 773 n.32 (1976). Its approval of the use of noncomparative evidence violates *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 369 n.53 (1977), and its reliance on after-acquired evidence or post-discrimination events to relieve a discriminator of all liability for wrongful conduct again conflicts with the decisions of several Circuits. The decision below will be a source of mischief in every area of employment discrimination litigation, and as a practical matter constitutes a license to discriminate. Finally, the airline policy upheld by the Court of Appeals is inimical to the national defense because it encourages highly trained military pilots to leave the armed services after completing their initial obligated flight duty.

1. It is imperative that the Court determine whether the "minimal increase in risk of harm" test posited by the Seventh Circuit (and followed below) or the two-pronged test (note 2 *supra*) of the Fourth, Fifth, Eighth and Ninth Circuits is the proper standard for judging bfoqs. A square conflict among circuits is presented.[5]

2. Regardless of which bfoq standard should have been applied, the failure below to scrutinize critically American's

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[5] *Compare Greyhound with Smallwood; Arritt; Tamiami Trail Tours, Inc.*; *Houghton* v. *McDonnell Douglas Corp.*, 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977), *on remand*, 627 F.2d 858 (1980); *Harriss* v. *Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980) (sex discrimination). The EEOC's interpretive regulations incorporate the majority rule. 46 Fed. Reg. 47,724, 47,725, 47,726 (1981) (to be codified in 29 C.F.R. § 1625.6(b)).

bfoq defense is an abdication of judicial responsibility.[6] Under *Dothard*, 433 U.S. at 331-34, the bfoq defense is an "extremely narrow exception" for which the employer must present a basis in fact.[7] Even under the relaxed "minimal increase in risk of harm" test suggested in *Greyhound*, mere management opinion is insufficient. 499 F.2d at 863; *see also Dothard*, 433 U.S. at 331-32. American's claim — that its duty of care requires it to have captains who have served as such at American for as long as possible, and therefore cockpit personel must begin with the particular airline no later than their 30s — was supported only by management opinion, rather than empirical evidence. *See, e.g., Kassel* v. *Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, 673 (1981) (plurality opinion) (noting absence of studies to establish "statistically significant difference in safety" as a result of state truck-size statute; statute invalid); *Horace* v. *City of Pontiac*, 624 F.2d 765, 769 (6th Cir. 1980) (noting absence of substantiating studies). American's hiring of Trans Caribbean's older pilots belies this claim. The deference afforded below to airline management opinion — greater even than that granted to state safety claims in cases such as *Kassel* — effectively inverts the burden of proof for the bfoq affirmative defense, and is entirely inappropriate in the case of a private employer's effort to bring itself within a narrow exception to the statute. Neither the airline's duty of care nor the reluctance of courts to inquire into technical issues should relieve the employer of the burden of proof.

In any event, it is clear that disapproval of the discriminatory airline policy here in issue would enhance, rather than compromise, airline safety. The policy has the effect of barring

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[6] As the EEOC observed in its rehearing petition, the decision below "has established the policy that the courts should abdicate to an employer's views about age where safety is at issue, regardless of how unfounded those views may be."

[7] *Dothard* arose under Title VII, but the Title VII bfoq defense is couched in the same terms as appear in the ADEA. The two should be construed consistently. *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979).

precisely those applicants who have the most experience, even though all parties agree, Pet. App. 33a, that experience is the key to airline safety. All new hires accumulate airline experience at approximately the same rate because of seniority systems. The person who enters such a system with more experience than others will *always* be the more experienced pilot. When that person becomes a captain, and is responsible for the safety of the aircraft and its passengers, his or her greater experience will necessarily enhance safety. The Court of Appeals mistakenly limited this benefit to the flight officer position. Pet. App. 6a n.5. It obviously applies to each cockpit position in sequence, as we argued below.

3. The decision below needlessly confuses the law of employment discrimination with respect to the evidence that may be used to show that an applicant would not have been hired in any event. The courts below wrongly permitted American to rely on prediscrimination evidence concerning Mr. Murnane's military career, not known to American when it rejected him and neither requested by nor available to it for other applicants, to show that he was not "competitively qualified." Plainly, such evidence does not show that Mr. Murnane would not have been hired even in the absence of discrimination, since the airline would not have had the service record before it in making hiring decisions.

Moreover, the conclusion that Mr. Murnane was not "competitively qualified" was reached without comparable evidence for any other applicant. Under *Teamsters*, such evidence is required where, as here, the employer seeks to "show that there were other, more qualified persons who would have been chosen."[8] Judging a discrimination plaintiff by different stan-

[8] 431 U.S. at 369 n.53. Neither court below explained how "competitive qualifications" could be evaluated on the basis of only Mr. Murnane's record. Here, such comparative evidence as there was (*e.g.*, as to total flight hours or average annual flight hours) demonstrated that Mr. Murnane was better qualified than many applicants who were hired. Since Mr. Murnane concededly met all of American's stated qualifications, and American failed

dards from those "*actually applied*" to others at the time of the discrimination violates *Franks*, 424 U.S. at 773 n.32 (emphasis in original). *See also Rodriguez* v. *Taylor*, 569 F.2d 1231, 1240 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Cohen* v. *West Haven Board of Police Comm'rs*, 638 F.2d 496, 503 n.11 (2d Cir. 1980); *Nanty*, 660 F.2d at 1334 n.8. An employer cannot have two levels of scrutiny: one for those who sue it for discrimination, and another for everyone else. 29 U.S.C. § 623(d) (1976) (prohibition on retaliation). "Given the opportunity for discovery . . . any defendant in a discrimination suit can find plausible reasons for its action."[9]

American was also permitted to rely on evidence of events that occurred *after* it rejected Mr. Murnane to determine whether he would have been hired in any event. Whatever its propriety with respect to injunctive relief, the use of post-

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to adduce comparative evidence as to any other, unstated qualifications, it failed to carry its burden under *Teamsters. East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977), relied on below, Pet. App. 9a, 35a, 40a, 47a, is inapposite because it involved unqualified applicants rather than the "competitive qualifications" of qualified applicants. 431 U.S. at 400.

[9] *Moyer* v. *Elder-Beerman Stores Corp.*, No. 80-3171 (6th Cir. July 8, 1981) (Merritt, J., dissenting), *petition for cert. filed*, 50 U.S.L.W. 3499 (U.S. Dec. 8, 1981) (No. 81-1073); *see also King* v. *New Hampshire Dep't of Resources and Economic Development*, 562 F.2d 80, 83 (1st Cir. 1977) ("[d]efendants cannot rely on information learned only in July to justify their refusal to hire plaintiff in May"); *Finkel* v. *Branti*, 457 F. Supp. 1284, 1292-93 (S.D.N.Y. 1978), *aff'd*, 598 F.2d 609 (2d Cir. 1979), *aff'd*, 445 U.S. 507 (1980); *Aumiller* v. *University of Delaware*, 434 F. Supp. 1273, 1303 & nn. 84, 86 (D. Del. 1977) (information learned in deposition could not have formed basis for earlier adverse personnel action); *United States* v. *Wattsburg Area School Dist.*, 429 F. Supp. 1370, 1379 (W.D. Pa. 1977) ("the evaluations of her teachings never surfaced as unsatisfactory until this controversy arose"); *Bishop* v. *Jelleff Associates*, 398 F. Supp. 579, 590 (D.D.C. 1974) (refusing to consider information discovered after termination).

discrimination evidence to deny an award of backpay squarely conflicts with decisions of the Second, Third and Eighth Circuits.[10] Allowing the use of such evidence thwarts public policy in two ways. First, it deters the discrimination victim "from seeking interim employment or a more permanent position lest it interfere with his opportunity to gain the preferred job from which he was unlawfully rejected." *Rodriguez*, 569 F.2d at 1240.[11] Second, it removes an important incentive for employers to develop and apply valid employment tests. *See Cohen*, 638 F.2d at 504; *cf. Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-18 (1975) (noting purposes served by "reasonably certain" award of backpay). Neither consequence serves the purposes of the ADEA.

4. This case presents important questions of federal law which have not been, but should be, settled by this Court. Hiring age limits are common in commercial aviation, Pet. App. 30a, and related fields.[12] Given the diametrically opposite holdings in this case and *Smallwood*, aviation employers and thousands of applicants for cockpit positions are without adequate guidance on either the controlling legal principles or the law specifically applicable to the entry-level job in question. The evidentiary issues are sweeping, and affect the full range of

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[10] *Cohen*, 638 F.2d at 502-04; *Rodriguez* v. *Taylor*, 569 F.2d at 1237-42; *Houghton*, 553 F.2d at 565 (entitlement to back pay until disability occurred).

[11] Under the ADEA, earnings from other jobs reduce the amount of a backpay award, *Brennan* v. *Ace Hardware Corp.*, 495 F.2d 368, 373 (8th Cir. 1974), and the complainant has a duty to use reasonable efforts to mitigate the employer's damages. *EEOC* v. *Sandia Corp.*, 639 F.2d 600, 627 (10th Cir. 1980). Given these holdings, it cannot be that an applicant risks losing his entitlement to any backpay when he attempts — as he must — to mitigate damages. Yet that is the result of the decision below.

[12] *E.g.*, *EEOC* v. *County of Los Angeles*, 526 F.Supp. 1135 (C.D. Cal. 1981), *appeal docketed*, No. 82-5083 (9th Cir. Jan. 25, 1982) (rejecting age-35 hiring limit for police helicopter pilots).

employment discrimination litigation. There are, therefore, "special and important" reasons for granting the writ.

5. Finally, the Court of Appeals' decision will have an adverse impact on both the national defense and the fisc. For years, the armed services have suffered from a shortage of pilots. Dr. Lawrence Korb, Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics), recently testified that

> [i]n contrast to our experience with enlisted personnel, we are achieving desired officer accession and retention objectives with a few exceptions. Unfortunately, the exceptions are in the high skill, high cost areas, such as in the pilot, navigator, nuclear qualified, and engineering officer specialties. Manning in these skills has shown a downward trend over the past several years, caused mainly by increased hiring by the airlines, power facilities, and other engineer-intensive industries. [13]

Unrebutted testimony from a former chief of the Leadership and Motivation Division at Strategic Air Command Headquarters demonstrated below that one of the major reasons for the pilot shortage is that military aviators know that if they are ever to obtain employment with a commercial airline (as many of them desire to do), they must quit the military after completing their initial obligated flight duty. If they remain, they will soon be "too old" for the airlines. J.A. 295-98.

The effect of the airlines' policy is that the government trains pilots at great expense to the taxpayers, only to lose them prematurely. Those who remain with the military longer, and

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[13] *Dep't of Defense Appropriations for 1982: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 97th Cong., 1st Sess., Pt. 8, at 19 (1981). Between FY 1977 and FY 1980, for example, Navy pilot retention fell from 62% to 30%. *Dep't of Defense Appropriations for Fiscal Year 1982: Hearings Before a Subcomm. of the Sen. Comm. on Appropriations*, 97th Cong., 1st Sess., Pt. 2, at 157 (1981).

who possess far greater experience than younger pilots, are unable to obtain employment with commercial airlines and put their skills to best use, in violation of congressional policy. The public interest therefore requires that this Court grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE R. FIDELL*
MICHAEL F. MCBRIDE
LEBOEUF, LAMB, LEIBY & MACRAE
Suite 1100
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 457-7500
Attorneys for Petitioner
**Counsel of Record.*

February 1982

Appendix

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1025

EDWARD L. MURNANE, APPELLANT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
(PLAINTIFF-INTERVENOR)

v.

AMERICAN AIRLINES, INC.

No. 80-1186

EDWARD L. MURNANE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
(PLAINTIFF-INTERVENOR), APPELLANT

v.

AMERICAN AIRLINES, INC.

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil No. 78-1217)

Argued February 20, 1981

Decided October 1, 1981

Judgment entered
this date

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Eugene R. Fidell with whom *Michael F. McBride* was on the brief for appellant Murnane.

Karen MacRae Smith, Attorney, Equal Employment Opportunity Commission, with whom *Lutz Alexander Prager*, Attorney, Equal Employment Opportunity Commission, was on the brief for appellant Equal Employment Opportunity Commission.

Dean Booth with whom *J. Stanley Hawkins* was on the brief for appellee.

Before: WILKEY and MIKVA, *Circuit Judges*, and GORDON,* *Senior United States District Judge* for the Western District of Kentucky.

Opinion for the Court filed by *Senior United States District Judge* GORDON.

GORDON, *Senior United States District Judge*: This appeal follows the district court's entry of judgment, following trial,[1] dismissing the complaint of plaintiff-appellant Edward L. Murnane and intervenor Equal Employment Opportunity Commission (EEOC). Appellant alleges that appellee American Airlines (American) discriminated against him on account of age. He initiated this cause under the Age Discrimination in Employment Act of 1967 (ADEA), as amended, Title 29 U.S.C. § 621, *et seq.*, which declares in relevant part that it shall be unlawful for an employer

> to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions,

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* Sitting by designation pursuant to 28 U.S.C. § 294(e).

[1] The opinion below dismissing appellant's complaint is reported at 482 F. Supp. 135 (D.D.C. 1979).

> or privileges of employment, because of such individual's age . . . .

Id. § 623(a). We affirm the district court's dismissal of appellant's complaint.

I. Factual Background

On April 1, 1976, appellant applied for employment as a Flight Officer with American, stating in his application that he was forty-three years of age. The position of Flight Officer is the first of three employment levels, i.e., Flight Officer, Co-pilot and Captain, which ultimately leads to a captaincy in an American cockpit. However, consideration of appellant for employment never advanced beyond the application phase, nor was he ever accorded an interview with American Airlines. In January of 1977, appellant registered a complaint to American about the lack of attention paid to his application and, being dissatisfied with American's response, then filed with the Department of Labor a complaint in which he alleged that American was discriminating against him in employment on the basis of age. The Department's informal conciliation efforts proved fruitless, and, on November 21, 1977, appellant was notified of his right to sue pursuant to the ADEA. This action was commenced on June 30, 1978.

The gravamen of appellant's claim arises out of appellee's established employment hiring practices. American maintains three cockpit positions, Flight Officer, Co-pilot and Captain. It is American's fixed policy to require all Flight Officers to advance to the position of Captain. No one is hired by American without this goal in mind. This is referred to as American's "up-or-out" policy. More specifically, if a Flight Officer or Co-pilot has received the maximum amount of training required for such position and is not qualified at that juncture to advance to the next post, then it is American's policy

to terminate such person's employment.[2] American's procedures do not allow for a career as a Flight Officer or Co-pilot. Finally, *American has a general guideline against hiring persons over the age of thirty*[3] *for the beginning position of Flight Officer.*

II. Legal Issues

The district court correctly found that appellant is a member of that class of persons intended to be protected under the ADEA, 29 U.S.C. § 631, and that appellant established a *prima facie* case of discrimination. However, the district court dismissed appellant's complaint because it went on to find:

> 1) That American's age forty guideline was a bona fide occupational qualification pursuant to 29 U.S.C. § 623(f)(1), and
>
> 2) That appellant would not have been hired in any event in view of the fact that he was not *competitively* qualified for the position of Flight Officer.

It is these two findings which appellant challenges on appeal. We shall consider each in turn.

A. *Applicant's Age Is A Bona Fide Occupational Qualification*

The ADEA provides at 29 U.S.C. § 623(f)(1) that:

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[2] The district court found that it takes an average of fourteen to twenty years to progress from the position of Flight Officer to that of Captain under American's extensive training system. There was, however, other evidence indicating that some employees might advance to the Captain's position in as few as ten years.

[3] For our purposes, we consider the guideline only at age forty inasmuch as those persons under the age of forty do not fall within that class of persons protected by the ADEA. It is thus unnecessary to address the validity of any age thirty guideline.

> It shall not be unlawful for an employer
> . . .
> to take any action otherwise prohibited under [subsection (a)] . . . of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age. . . .

The issue before this court, then, is whether age is a "bona fide occupational qualification" (BFOQ) which is "reasonably necessary to the normal operation" of the airline business. We conclude that it is.

The evidence entered at trial indicates that "pilot error" accounts for 90 percent of all aviation accidents, but that the incidence of aviation accidents decreases as the pilot gains experience. Moreover, the district court found "credible and persuasive" evidence that "the *best* experience an American Captain can have is acquired by flying American aircraft in American's three cockpit positions." 482 F. Supp. at 147 (emphasis in the original). Thus, the safest Captain will be experienced, and as much of that experience as possible will have been with American.

But since it takes at least ten to fifteen years to progress from Flight Officer to Co-Pilot to Captain, if appellant were hired as Flight Officer in his forties he would probably not become Captain until his late fifties. The Federal Aviation Administration itself requires retirement at age 60, so that he would be able to serve only briefly as an American Captain before he had to retire. Appellant would then be replaced by another pilot, also new to captaincy in an American cockpit. On the other hand, by limiting its new hiring to relatively young pilots, American thereby ensures that the experience with Amer-

ican of its active Captains will be maximized. This, as we pointed out earlier, maximizes safety.[4]

Appellant contends that the district court's findings indicate only a marginal increase in the safety of the passengers on an American aircraft, and that such marginal safety is insufficient to support a blanket age rule. He asserts that a BFOQ cannot be supported by a minimal increase in safety when balanced against the fact that many potential applicants will not be able to pursue their chosen careers. We disagree.[5]

Indeed, on the contrary, we find the maximization of safety to be "reasonably necessary to the normal operation" of American Airlines. The safe transportation of its passengers is the *essence* of American's business, see, *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971), and there exists a Congressional mandate that an airline must operate its business with "the highest possible degree" of care. 49 U.S.C. § 1421(b). On this matter the following observation by the court in *Harriss v. Pan*

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[4] It is noteworthy to us that the district court did not premise his BFOQ determination on a finding that there exists a correlation between the increased chronological age of a pilot and his or her decreased ability to operate an aircraft in a safe manner. On the contrary, he concluded that an older Captain who had served in that position for the longest possible period of time would be the safest Captain.

[5] Appellant also argues that instances can be postulated, especially over the short run, where he might be a safer Flight officer than a younger hire. But we cannot say that the district court erred in its conclusion that these countervailing considerations were outweighed, especially over the long run, by the greater safety ensured in the other situations just discussed in the text. In particular, it should be pointed out that it is more important to have a safe *Captain* than a safe *Flight Officer*, see 482 F. Supp. at 145-46; appellant's arguments apply to the latter, but appellee's policies ensure the former.

American World Airways, Inc., 437 F. Supp. 413 (N.D. Cal. 1977), *aff'd in relevant part*, 649 F.2d 670 (9th Cir. 1980), is especially pertinent:

> As an air carrier with a public duty to operate with the highest degree of safety, Pan Am is in the business of avoiding and managing the risks resulting from low probability occurrences which could have extremely serious consequences. Indeed, such risk management is of the essence of Pan Am's business, since aircraft accidents and incidents are invariably unique and low probability occurrences.

347 F. Supp. at 434. American likewise is in the business of managing risk factors and probabilities. As the district court observed and emphasized, the airline industry is one in which safety is of the utmost importance. The staggering death tolls and resulting human suffering which have followed some of our nation's horrible air disasters attest to this fact. Therefore, in our judgment, the airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated *most safely*, *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 n.30 (5th Cir. 1976). This is in accord with American's view that "safe" is not sufficient. Rather, the "safest" possible air transportation is the ultimate goal. Courts, in our view, do not possess the expertise with which, in a cause presenting safety as the critical element, to supplant their judgments for those of the employer.

Appellant's argument concerning the undisputed fact that all Captains, irrespective of their ages, must begin with no experience as Captains is similarly not persuasive. The fact remains that, as previously indicated, American's intended goal of maintaining a staff of Captains which has the longest possible record of experience in American cockpits is, in our opinion, completely justified. We believe that the district court's findings of fact,

many of which were agreed to by the parties, support the conclusion that American's hiring policies, including the age forty guideline, might result in the death of one less person than were American required to abandon or modify these policies. See, *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 863 (7th Cir. 1974), *cert. denied sub nom. Brennan v. Greyhound Lines, Inc.*, 419 U.S. 1122 (1975).

In sum, there was ample factual evidence and legal precedent to support the findings of the district court. We conclude that American's age forty guideline was a bona fide occupational qualification "reasonably necessary to the normal operation" of American Airlines.[6]

B. *Appellant Is Not Competitively Qualified*

Even if the age forty guideline were not a bona fide occupational qualification, we think it clear that appellant would still not have been hired since he was not *competitively* qualified for the position of Flight Officer. As the district court pointed out in its thorough examination of this issue, "it is clear from credible and persuasive evidence that plaintiff [appellant] would not have been selected during the later stages of the pilot selection process." 482 F. Supp. at 148. There was strong evidence of major deficiencies in both appellant's judgment and in his flying skill itself. This case is therefore within the principles enunciated by the Supreme Court in *East*

[6] We are further convinced that an economic benefit *which is merely incidental or collateral* to an otherwise perfectly valid BFOQ is not sufficient reason to declare the same legally invalid. American concedes in its brief that the economy of the situation favors the hiring of younger Flight Officers who ultimately will serve more years as Captains on American's airplanes. But this does not change the fact that there are substantial safety benefits to the public as a result of American's implementation of the hiring practice at issue herein.

Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977).

In *East Texas* the Supreme Court stated that "[t]he District Court found upon abundant evidence that these plaintiffs lacked the qualifications to be hired as line drivers. Thus, they could have suffered no injury as a result of the alleged discriminatory practices . . . ." *Id.* at 403-404. In a footnote to this text, the Supreme Court reviewed the deficiencies in plaintiff's job performance, and concluded that "[i]n light of this evidence, the District Court's finding that none of the respondents was qualified to be a line driver was not clearly erroneous." *Id.* at 404 n.9. Finally, the Court pointed out, "*Even assuming*, arguendo, *that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents had not been injured because they were not qualified and would not have been hired in any event.*" *Id.* (emphasis added).

Similarly, in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the Supreme Court said that in anti-discrimination litigation the courts must allow the employer to show that the party alleging discrimination was "not a victim of discrimination. For example, the employer might show that there were other, more qualified persons who would have been chosen for a particular vacancy, or that the . . .[plaintiff's] stated qualifications were insufficient." *Id.* at 369 n.53, citing *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 773 n.32 (1976) ("[Defendant] may attempt to prove that a given individual . . . was not in fact discriminatorily refused employment. . . . [E]vidence indicating the individual's lack of qualification . . . would of course be relevant."). See also, *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 284-87 (1977).

In the case at hand, as we have already stated, there is "credible and persuasive evidence" that appellant would not have been selected for the position he claims to have been illegally denied, whether or not the age requirement he objects to was illegally discriminatory. Therefore, applying the principles in the Supreme Court cases just discussed, we conclude that appellant cannot prevail on this appeal.

III. Conclusion

The district court found, first, that American's age forty guideline was a bona fide occupational qualification and, second, that appellant would not have been hired in any event since he was not competitively qualified. We agree with both these findings. The decision of the district court is therefore

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 80-1025
Civil Action No. 79-1217

EDWARD L. MURNANE,

Appellant

EEOC

v.

AMERICAN AIRLINES, INC.

And Consolidated Case No. 80-1186
Argued 2-20-81

BEFORE: Wilkey and Mikva, Circuit Judges and James F. Gordon*, Senior District Judge for the District of Kentucky

ORDER
(November 19, 1981)

On consideration of the petitions for rehearing filed by Edward L. Murnane and EEOC, it is

ORDERED by the Court that the aforesaid petitions are denied.

Per Curiam

FOR THE COURT:

George A. Fisher,
Clerk

BY: _____
ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. § 292(d).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 80-1025
Civil Action No. 78-1217

EDWARD L. MURNANE,

Appellant

EEOC

v.

AMERICAN AIRLINES, INC.

And Consolidated Case No. 80-1186
Argued 2-20-81

BEFORE: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

ORDER
(November 19, 1981)

The suggestions for rehearing *en banc* of Edward L. Murnane and the EEOC have been circulated to the full Court. A majority of the Court has not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestions are denied.

Per Curiam

FOR THE COURT:

George A. Fisher,
Clerk

BY: _____
ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Circuit Judge MacKinnon would grant the suggestion for rehearing *en banc* of the EEOC.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1025

September Term, 1981

Civil Action No. 78-1217

EDWARD L. MURNANE,
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,
(Pltf.-Intervenor),

Appellant

v.

AMERICAN AIRLINES, INC.

And Consolidated Case No. 80-1186
Argued 2-20-81

BEFORE: Wilkey and Mikva; Circuit Judges, and Senior District Judge James F. Gordon* of the Western District of Kentucky

ORDER
Filed Feb. 23, 1981

On consideration of appellants' motion to take judicial notice, filed February 17, 1981, it is

ORDERED by the Court that the aforesaid motion is granted.

Per Curiam

FOR THE COURT:

George A. Fisher, Clerk

/s/ _____

ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. § 294(c).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1217

EDWARD L. MURNANE, *Plaintiff*,

RAY MARSHALL, SECRETARY, UNITED STATES DEPARTMENT OF LABOR, *Plaintiff-Intervenor*,

v.

AMERICAN AIRLINES, INC., *Defendant*.

APPEARANCES

For the Plaintiff:
Eugene R. Fidell, Esquire
Michael F. McBride, Esquire
LeBoeuf, Lamb, Leiby & MacRae
Washington, D.C.

For the Plaintiff-Intervenor:
Donald R. McCoy, Esquire
with: Carin N. Clauss,
Solicitor of Labor
Marshall H. Harris, Esquire
Sue Ann Wolff, Esquire
on the brief.
United States Department of Labor
Washington, D.C.

For the Defendant:
Dean Booth, Esquire
John G. Grubb, Esquire
William H. Boice, Esquire
Seward and Kissel
Atlanta, Georgia

MEMORANDUM OPINION OF UNITED STATES DISTRICT JUDGE CHARLES R. RICHEY
Filed Nov. 8, 1979

I. Introduction

This action is brought under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* (1976), ("the

Act" or "ADEA"). Section 4(a)(1) of the Act, 29 U.S.C. § 623(a)(1), makes it unlawful for an employer:

> to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

The defendant, American Airlines, Inc., ("American"), is a commercial airline. It is an employer within the meaning of the Act. 29 U.S.C. § 630(b). The plaintiff, Edward L. Murnane, is a retired Navy and Coast Guard aviator who applied for a position as a pilot with American when he was forty-three years old. He is thus a member of the protected class under ADEA, 29 U.S.C. § 631. The plaintiff-intervenor, Ray Marshall, is the Secretary of the United States Department of Labor. Under the Act, he is responsible for implementation of its provisions. 29 U.S.C. § 625.

Plaintiff Murnane filed this action on June 30, 1978, alleging that defendant American wilfully violated the Act by failing or refusing to hire or consider him for employment because of his age. On January 19, 1979, Secretary Marshall was given leave to intervene as a party plaintiff.

In his prayer for relief, plaintiff originally sought an offer of employment with the defendant upon such terms and conditions as he would have had but for the alleged discrimination. However, in his memorandum in opposition to defendant's motion for summary judgment (filed January 29, 1979), plaintiff indicated that "at this stage" he would request only injunctive relief requiring remedial flight training and consideration of his application by American. In addition, he seeks the amount of back wages he would have received if the defendant had employed him, an additional equal amount of liquidated damages as provided by the Act, 29 U.S.C. § 626, as well as costs, attorneys' fees, and other appropriate relief. The Secretary joins in these requests on plaintiff Murnane's behalf, and also seeks to permanently enjoin the defendant from violating the provisions of section 4(a)(1) of the Act, 29 U.S.C. § 623, as set forth above.

On January 22, 1979, the defendant filed a motion for summary judgment. However, since a five-day trial was held before the Court

beginning on January 29, 1979, the Court will decide the case on the basis of the evidence adduced at trial.

The defendant has presented several challenges to the Court's jurisdiction over this action. It also contends that the plaintiff has failed to discharge his burden of establishing a *prima facie* case of age discrimination within the meaning of the Act. In addition, defendant contends, among other things, that an age lower than the plaintiff's at time of hiring is within the statutory exception under the Act for bona fide occupational qualifications (BFOQ), 29 U.S.C. § 623(f)(1). Finally, the defendant argues that whether or not there was impermissible age discrimination against plaintiff, he is not entitled to relief because he would not have been hired by American in any event. Thus, the issues before the Court are:

1) Whether the Court has jurisdiction over this action under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 626;

2) Whether the plaintiff has established a *prima facie* case of age discrimination in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, *et seq.*;

3) Whether an age lower than plaintiff's at time of hiring is a bona fide occupational qualification within the meaning of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 623(f)(1);

4) Whether plaintiff would be entitled to any relief whether or not discriminated against on the basis of age.

The Court will first set forth background information which it considers relevant to its decision. American's policies concerning pilot hiring are more properly articulated in light of its contention that an age lower than forty at time of hiring is a bona fide occupational qualification for the position of Flight Officer within the meaning of ADEA, as amended, 29 U.S.C. § 623(f)(1). The Court then will consider the issues set forth *seriatim*. Accordingly, the following constitutes the Court's findings of fact and conclusions of law.

II. Background

A. The Plaintiff's Application

Plaintiff applied for employment with American on April 1, 1976. He submitted an employment application and a "pilot supplemental sheet" at American's Los Angeles personnel office. The position for which he applied was that of Flight Officer, the entry level pilot position, which ultimately may result in advancement to the Captain position. The information received by American indicated that the applicant was forty-three years old. He had served on active duty as an aviator with the Navy and the Coast Guard for a total of twenty-six years. All agree that he met the *basic* requirements for the position of Flight Officer, which are discussed in detail below. He also possessed a Federal Aviation Administration (FAA) Flight Engineer Certificate, which must be obtained to perform the duties of Flight Officer. In addition, he possessed the Air Transport Pilot's rating which is required to act as co-pilot or pilot of a commercial aircraft.

In September, 1976, plaintiff Murnane contacted the defendant's employee, Mrs. Juanita McCullough, who had received his application in Los Angeles, to inform her of his temporary move to another city and to update his application. In November, 1976, the application was transferred to American's Dallas-Fort Worth, Texas office, with other pending pilot applications. Plaintiff was informed of this transfer in January, 1977. Apart from this, he heard nothing from American concerning the application.

During January, 1977, plaintiff complained to American representatives that his application was not being considered because of his age. This complaint was founded upon his familiarity with an industry-wide reluctance to hire older pilots. He was referred to American's Equal Employment Opportunity (EEO) officer, but was not given any reason at that time for failure to afford him an interview.

On February 1, 1977, plaintiff filed a complaint with the United States Department of Labor, alleging discrimination on the basis of age. He was notified on May 17, 1977, that the Department was undertaking informal remedial conciliation efforts on his behalf. *See* 29 U.S.C. § 626(d)(2). On November 21, 1977, the Department notified plaintiff that the attempt at informal conciliation had failed,

and he was therefore free to pursue independent legal action under the Act. At some time prior to May 26, 1977, a parallel complaint was filed with the California Fair Employment Practices Commission (FEPC).[1] This complaint was formalized on February 15, 1978. In response to the state agency's request for information regarding its hiring policies, American suggested that since plaintiff had chosen to pursue his federal remedies, the FEPC investigation should be closed, and refused to furnish the information requested.

For purposes of this lawsuit, all parties agree that defendant's conduct after December 31, 1976, with respect to plaintiff's application, is irrelevant. This agreement is based on the grounds that (a) any rejection of the plaintiff which the Court finds to have occurred must have occurred during 1976, and (b) plaintiff filed his federal employment discrimination complaint shortly after that date, on February 1, 1977. Plaintiff's conduct and performance on other jobs after December 31, 1976, however, is relevant to the issue of whether plaintiff would be entitled to any relief whether or not discriminated against on the basis of age. This issue will be considered in detail by the Court in part III. E., *supra*, of this memorandum opinion.

II. The Jurisdictional Challenges

Defendant American presents three challenges to the Court's jurisdiction over this action. The first two challenges encompass American's argument that plaintiff failed to comply with the "jurisdictional prerequisites" of the Act. The final challenge is founded upon the applicable statute of limitations. The Court will consider these challenges *seriatim*.

First, American challenges plaintiff's filing of his formal "Notice of Intent to Sue" with the Department of Labor on April 25, 1977, as untimely under § 7(b)(1) of the Act, 29 U.S.C. § 626(d)(1). Prior to the Act's amendment in 1978, this section required a complainant to file a formal "Notice of Intent to Sue" with the Department of Labor within 180 days of the occurrence of the alleged unlawful employ-

[1] Although this complaint is undated, plaintiff received a letter dated May 26, 1977, from the California FEPC regarding his complaint. Thus, the evidence is clear that the complaint had been filed prior to that date.

ment practice.[2] However, § 7(b)(1) of the Act simply is not applicable to plaintiff. Rather, it is § 7(b)(2) of the Act, 29 U.S.C. § 626(d)(2), with which plaintiff must comply. Where, as here, the alleged unlawful practice occurs "in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice", 29 U.S.C. § 633, the complainant must file a formal "Notice of Intent to Sue" within *300* days after the alleged unlawful practice occurred or within 30 days after receipt by the complainant of notice of termination of proceedings under State law, whichever is earlier. 29 U.S.C. § 626(d)(2). Since the alleged unlawful practice occurred in California which has both an age discrimination law and the California Fair Employment Practice Commission (FEPC) which enforces that law, the 300-day, rather than the 180-day, notice requirement is applicable to plaintiff.

The Act does not specifically define the time when an alleged unlawful practice is deemed to have occurred. Under such circumstances, any ambiguity as to the date of that occurrence should be resolved in favor of the complainant. *Moses* v. *Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975). For purposes of the 300-day notice requirement, the alleged unlawful practice would be said to have occurred on the date plaintiff received notice of, or could reasonably have been expected to have known of, the alleged unlawful rejection of his employment application. There is substantial question in this case as to the date on which the rejection occurred. It is American's position that it *never* "rejected" plaintiff, because it never "rejects" any applicant. Certainly, American never notified plaintiff of his "rejection". The Court views this contention as frivolous and merely a futile semantic exercise on American's part. Further, the Court finds American in the anomalous position of denying that a rejection ever occurred while asserting that a rejection

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[2] Section 7(b)(1) of the Act, 29 U.S.C. § 626(d)(1), was amended by the Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 4(b)(1), 92 Stat. 190, which substituted references to the filing of a charge with the Secretary alleging unlawful discrimination for references to the filing with the Secretary of notice of intent to sue.

did occur and plaintiff was adequately informed of it, but did not file timely notice.

In order for plaintiff's April 25, 1977 filing with the Department of Labor to be considered untimely, plaintiff must have been rejected, and have notice of the rejection, prior to June 25, 1976. However, evidence has been presented which clearly establishes that plaintiff's application was updated and forwarded with other *pending* applications to American's Dallas-Fort Worth office in November, 1976. Certainly, plaintiff was not rejected prior to this date. Thus, the applicable notice requirement of the Act, 29 U.S.C. § 626(d)(2), is not a bar to the Court's jurisdiction over this action.

In its second "jurisdictional prerequisite" challenge, American maintains that plaintiff's failure to file a formal complaint with the California FEPC until February 15, 1978, nearly one year after the initiation of federal administrative action, constitutes a failure to comply with § 14(b) of the Act, 29 U.S.C. § 633(b). [3] Therefore, American argues, this Court lacks subject matter jurisdiction over this suit. Again, the Court disagrees.

Plaintiff filed an informal complaint with the Secretary of Labor on February 1, 1977. He then filed a formal "Notice of Intent to Sue" with the Secretary on April 25, 1977. At some time prior to May 26, 1977, a parallel complaint was filed with the California FEPC. [4] This state administrative complaint was formalized on February 15, 1978. Finally, plaintiff filed this suit in United States District Court on June 30, 1978. It is the delay of nearly ten months between the formal filings with the federal and state agencies which American maintains renders this Court's jurisdiction defective. Apparently, American

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[3] Section 14(b) of the Act, 29 U.S.C. § 633(b), provides in pertinent part:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a state authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated.

[4] *See* n.1, *supra*.

also contends that the Act requires plaintiff to first resort to the state agency before pursuing federal administrative action.

The recent Supreme Court decision in *Oscar Mayer & Co.* v. *Evans*, 99 S.Ct. 2066 (1979), is dispositive of American's challenge in regard to plaintiff's state administrative action. *Oscar Mayer* makes it clear that the filing of state administrative proceedings is, as American maintains, a jurisdictional prerequisite to federal relief under the Act. However, under the Act, "grievants may file with State and federal agencies simultaneously." 99 S.Ct. at 2072. Thus, the Act permits concurrent rather than sequential state and federal administrative jurisdiction in order to expedite the processing of age discrimination claims. Furthermore, ADEA grievants may file with the state before *or after* they file with the Secretary of Labor. 99 S.Ct. at 2072, n.4. Thus, plaintiff's federal remedy is not jeopardized simply because he filed his complaint with the appropriate federal agency before filing a complaint with the authorized state agency. Nor is American's objection to the delay between the federal and state filings fatal to the Court's jurisdiction over this action. Clearly, plaintiff's informal complaint to the state agency prior to May 26, 1977, only one month after the formal federal filing, met the statutory purpose of § 14(b) of the Act, 29 U.S.C. § 633(b). As articulated in *Oscar Mayer*, this purpose is to permit the state agency an opportunity to attempt informal conciliation. *See* 99 S.Ct. at 2072. In addition, plaintiff's formal filing with the California FEPC on February 15, 1978, occurred more than sixty days prior to the bringing of this action on June 30, 1978. Thus, the sixty-day period for the pendency of state administrative proceedings had elapsed, as required by § 14(b) of the Act, 29 U.S.C. § 633(b). Therefore, the Court concludes that plaintiff is in full compliance with the jurisdictional prerequisites of § 14(b) of the Act, 29 U.S.C. § 633(b).

American's final jurisdictional challenge maintains that plaintiff failed to meet the applicable statute of limitations. The act requires that civil actions be commenced within two years of the alleged unlawful practice, except in the case of willful violations, where the period is extended to three years. 29 U.S.C. § 626(e) (incorporating 29 U.S.C § 255). The Court finds this challenge without merit.

This action was filed in the District Court on June 30, 1978. The case would be barred only if plaintiff was rejected prior to June 30, 1976, and the defendant's action was not willful. The Court has already found that the plaintiff was not rejected before November, 1976. Therefore, the Court finds that plaintiff timely filed this suit and American's statute of limitations challenge is patently without merit.

III. Discussion

A. The Existence of the "Age 30 Guideline", Without an Admission That It Was Applied to the Plaintiff, Does Not Constitute a Per Se Violation of the Act Under Houghton v. McDonnell-Douglas.

Plaintiff asks this Court to find that the defendant's conduct in relation to his application constitutes a *per se* violation of the Act, as occurred in *Houghton* v. *McDonnell-Douglas Corp.*, 553 F.2d 561 (8th Cir. 1977), *cert. denied*, 434 U.S. 966 (1977). In *Houghton*, the employer admitted that it had transferred the plaintiff from flight status as a test pilot solely on the proposition that age fell within the Act's exception for bona fide occupational qualifications (BFOQ), 29 U.S.C. § 623(f)(1). When the court found that age of less than fifty was not a BFOQ for an experienced test pilot, it was clear that the admitted application of such a standard to the plaintiff constituted a violation of the act. Questions regarding plaintiff's *prima facie* case and the defendant's alleged nondiscriminatory reasons for the rejection simply did not arise due to this admission.

This case is not one of *per se* age discrimination, as was found in *Houghton*. American does not deny that it has an unwritten guideline of age thirty for pilot hiring (the "age 30 guideline" is discussed in part D *infra)*. However, it contends that the guideline was not applied to plaintiff. Here, unlike the defendant in *Houghton*, American does not admit that age was a criteria, much less the sole criteria, used in considering plaintiff's application. Under these circumstances, the plaintiff must carry his initial burden of proof of a *prima facie* case, as in other discrimination cases in which the defendant denies having used discriminatory criteria in making a decision.

B. The Burden Of Proof In ADEA Cases.

As in other civil litigation, the initial burden of proof in cases brought under ADEA is upon the plaintiff. The criteria for establishing a *prima facie* case of employment discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, were set forth in *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). These criteria are applicable to cases under ADEA. *See Cova* v. *Coca Cola Bottling Co., of St. Louis*, 574 F.2d 958 (8th Cir. 1978). Under the criteria established in *McDonnell-Douglas*, the plaintiff is required to demonstrate: (1) that he belongs to the protected class, (2) that he applied and was qualified for a job for which the employer was seeking applicants, (3) that he was rejected despite his qualification, and (4) that, after his rejection, the employer continued to seek applicants with similar qualifications for the position for which plaintiff applied. Assuming that the plaintiff successfully establishes these four elements by a preponderance of the evidence, the defendant may rebut the inference of discriminatory motive resulting from such a showing, by articulating a legitimate, nondiscriminatory motive for its treatment of the plaintiff. *McDonnell-Douglas, supra* at 802; *Furnco Construction Corp.* v. *Waters*. 438 U.S. 567 (1978). If the defendant makes this showing, the plaintiff may then attempt to show that the defendant's justification is a pretext for discriminatory action, or was discriminatory in application. *McDonnell-Douglas, supra* at 804-7. In a case under ADEA, as here, the defendant also may attempt to prove that, although it worked to the detriment of the protected class of which plaintiff is a member, the challenged standard is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of its business. 29 U.S.C. § 623(f)(1). The Court will now consider whether plaintiff has made out a *prima facie* case of age discrimination by a preponderance of the evidence.

C. Notwithstanding The Bona Fide Occupational Qualification Issue, Plaintiff Has Made Out A Prima Facie Case of Age Discrimination By A Preponderance Of The Evidence.

Plaintiff was forty-three years of age when he applied for employment with American. As such, he is clearly within the protected age group under the Act. 29 U.S.C. § 631.

The Court finds it equally clear that plaintiff was qualified and applied for the position of Flight Officer for which American was seeking applicants. American concedes that plaintiff meets the basic qualifications of American pilots. These qualifications are as follows:

Age:	Minimum 21
Height:	5'6'' — 6'4''
Weight:	In proportion to height.
Visual Acuity:	20/20 without glasses, each eye separately.
Education:	College degree or its equivalent preferred.
Citizenship:	No restrictions; however, applicants must be able to read, write, fluently speak and understand the English language.
Certificates, Ratings & Permits:	Valid FAA Commercial Type Pilot Certificate with an instrument rating, no limitations -OR- Current Air Transport Pilot Rating.
	Flight Engineer Basic & Turbojet written examination passed, or FEX, within the past 24 months -OR- Valid Turbojet Flight Engineer Certificate.
	Valid FCC Restricted Radio Telephone Operator Permit.
	Valid First Class FAA Medical Certificate. No Waivers.
Flying Time:	Commensurate with other qualifications.

To establish his *prima facie* case, the plaintiff only need show that he meets the basic requirements of the job. He need not show as part of his *prima facie* case, as American contends, that his "competitive qualifications" were such that he would have been hired had the defendant not applied any discriminatory standards to his application. Such "competitive qualifications" are considered by American in a stage of the application process which plaintiff's application never, in fact, reached. The *prima facie* requirement that plaintiff show he was qualified for the position sought should not be construed to require plaintiff to show that, ultimately, he would have been hired. Rather, the Court is of the opinion that a requirement that plaintiff show that he possessed the job qualifications regularly considered by American at the stage in the application process in which plaintiff was, in fact, rejected, comports with the test envisioned by the Supreme Court in *McDonnell-Douglas*. It is clear that plaintiff was rejected in the first "stage" of the application process where only the basic qualifications for the position of Flight Officer are considered. Therefore, plaintiff need only show that he met these qualifications at the time he was rejected. The "competitive qualifications" considered by American in a later stage of the application process are more properly viewed in light of the issue of whether plaintiff would be entitled to relief whether or not discriminated against on the basis of age.

The Court has already addressed the issue of whether and when American rejected plaintiff. As already noted, American contends that it never "rejected" plaintiff because it never "rejects" any applicant. The Court will not indulge American's semantic agility describing its selective inaction concerning pilot applications. The Court views American's failure to hire plaintiff, despite his qualifications, as a rejection.

Finally, the Court finds that American has continued to hire applicants, of similar or lesser qualifications than the plaintiff's, since the time of plaintiff's application. Since April 1, 1976, when plaintiff filed his application, American has hired 443 pilots. All of these pilots were under the age of thirty-five and outside the protected class under the Act. Many of these successful applicants were less qualified than the plaintiff in terms of total flying experience, which

American propounds as the major factor in determining selection for the position of Flight Officer.

It is clear, therefore, that plaintiff has successfully met his initial burden of making out a *prima facie* case of age discrimination. The burden of rebutting this showing thus shifts to American. While American advances several arguments in an attempt to carry its burden, the Court finds that American's bona fide occupational qualification defense is persuasive and dispositive of this case. Therefore, it is not necessary for the Court to reach the merits of American's other attempts to rebut plaintiff's *prima facie* case, and the Court declines to do so.

D. Age Of Less Than Forty At Time Of Hiring Is A Bona Fide Occupational Qualification For The Position Of Flight Officer At American.

Section 4(f)(1) of ADEA, 29 U.S.C. § 623(f)(1), which provides an exception to the prohibition against age discrimination, reads in pertinent part:

> (f) It shall not be unlawful for an employer * * *
>
> (1) to take any action otherwise prohibited under subsection (a) * * * of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age; * * *

In attempting to implement the bona fide occupational qualification (BFOQ) exception of the Act, American has the burden of proving its actions were within the scope of the exception. *Houghton* v. *McDonnell-Douglas Corp.*, 553 F.2d 561, 564 (8th Cir. 1977), *cert. denied* 434 U.S. 966 (1977).

While American has advanced several BFOQ arguments, the Court concludes that the argument discussed in detail *infra*, is dispositive of this case. Therefore, it is not necessary for the Court to reach the merits of the other BFOQ arguments presented by American, and the Court declines to do so. The Court sets forth certain background information which it considers relevant to consideration

of the BFOQ issue, and then proceeds to address American's argument.

American is a scheduled air carrier whose principal business is the safe transportation of passengers in interstate and international commerce. American presently has four kinds of aircraft in its fleet: the Boeing 747, the DC-10, the Boeing 707, and the Boeing 727. There are three cockpit positions in each of these aircraft and, since 1964, it has been American's policy to hire only pilots for these positions. [5] The three cockpit positions are Captain, Co-pilot, and Flight Officer. [6] In all cases, the entry level position at American is Flight Officer.

It is American's policy to hire only future Captains. In other words, every pilot considered and hired by American is evaluated as a future Captain and is expected to progress to the position of Captain. American has an "up-or-out" policy, which requires the pilot to demonstrate the ability to progress to the next highest cockpit position or be terminated. [7]

At the present time the progression from Flight Officer to Co-pilot to Captain takes approximately fourteen to twenty years, and averages sixteen years, with the time equally divided between the Flight Officer and Co-pilot positions. Progression from one cockpit position to another is controlled by the availability of openings for Co-pilots and Captains, seniority, and the terms of the applicable collective

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[5] This policy is a result of negotiations with the union representing American's pilots, the Allied Pilots Association. American has "professional" Flight Officers, i.e., non-pilot Flight Officers, who continue to work for American, but no nonpilots have been hired for the cockpit positions since 1964.

[6] On other airlines, these positions may be designated differently. For example, the Flight Officer position is sometimes referred to as the Second Officer or Flight Engineer position, and the Co-pilot is sometimes designated as First Officer.

[7] This policy is shared by some other scheduled air carriers as well. For example, there is testimony indicating that Delta Airlines has such a policy.

bargaining agreement. Crewmembers undergo additional screening, training and testing before advancing to the next position.

The Federal Aviation Administration ("FAA") has promulgated regulations which require American to retire its Captains and Co-pilots at age sixty ("the FAA age 60 rule"). 14 C.F.R. § 121.383(c) (1979).[8] American does not allow former Captains, age sixty and over, to bid back to the Flight Officer position. Therefore, no pilot who has reached his or her sixtieth birthday continues to work in an American cockpit.[9]

In addition to its basic Flight Officer prerequisites, discussed *supra*, American maintains an unwritten policy against hiring pilot applicants over age thirty. This policy has been described as the "age 30 guideline" and appears to be consistent with the custom throughout the airline industry. American no longer disputes the existence of this guideline but contends that it is flexible and does not constitute an absolute, across-the-board policy. Furthermore, American's contention that a maximum hiring age of forty is a BFOQ under the Act, if found persuasive, would justify the guideline.[10] The Court will now address this contention.

American contends that a policy of hiring only pilots younger than forty years of age enhances the safety of American's operation and reduces the risk to American's passengers.

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[8] The FAA age 60 rule has been upheld as a reasonable exercise of administrative discretion. *O'Donnell* v. *Shaffer*, 491 F.2d 59 (D.C. Cir. 1974).

[9] The policy of disallowing the return of Captains to the Flight Officer position appears to be shared by several other airlines as well. Such a policy permits American to train *future* Captains and enables the Flight Officer to gain valuable and necessary experience for their ultimate Captaincy.

[10] The Act only protects individuals who are at least forty but less than sixty-five years of age. 29 U.S.C. § 631. Thus, it is the effect of American's "age 30 guideline" on individuals over the age of forty which must be justified as within the BFOQ exception. Presumably, American is free to reject individuals under the age of forty on account of their age alone.

American's argument may be summarized as follows:

1) American has a statutory duty to conduct its business with the highest degree of care for the safety of its passengers.

2) In order to maximize safety and minimize risk of injury or death, the American Captain must undergo a long and intensive training program *at American*.

3) Since it takes an average of sixteen years to progress from Flight Officer to Captain, an applicant hired at an age above forty would not acquire the requisite experience needed to maximize safety, before being forced to retire at age sixty by the FAA age 60 rule.

4) Consequently, elimination of the age-below-40 hiring policy will increase the likelihood of risk of harm to passengers and crew.

The Court finds this argument persuasive. It is the Captain who is in command of American's aircraft and who is primarily responsible for the safety of American's passengers and crew. The evidence indicates that pilot factors or 'pilot error" are the probable cause of 90% of aircraft accidents. If an American Airlines Captain errs, the death or injury of as many as 400 passengers and crew, and the destruction or damage of a multi-million dollar aircraft, can result.

The primary function of an airline is to transport passengers safely from one point to another. *Diaz* v. *Pan American World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971). Indeed, the Court finds that safety is the essence of American's business. The airline industry, including American, has a duty pursuant to the Federal Aviation Act of 1958 to conduct its business with "the highest possible degree" of care for the safety of its passengers. 49 U.S.C. § 1421(b) (1976). *See Condit* v. *United Air Lines, Inc.*, 558 F.2d 1176 (4th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978). Heeding that duty, the airline industry has over the years changed flying from a mode of transportation which was originally considered "inherently dangerous" to one which is the safest mode now available. The airline industry is duty bound to attempt to reduce

risk to its passengers. As the court in *Harriss* v. *Pan American World Airways, Inc.*, 437 F. Supp. 411 (N.D. Cal. 1977) explained:

> As an air carrier with a public duty to operate with the highest degree of safety, Pan Am [and American] is in the business of avoiding and managing the risks resulting from low probability occurrences which could have extremely serious consequences. Indeed, such risk management is of the essence of Pan Am's business, since aircraft accidents and incidents are invariably unique and low probability occurrences.

437 F.Supp. at 434. Thus, it is American's duty to attempt to eliminate as much risk to the passenger as possible, even if the probability of an accident or incident resulting from that risk is extremely low.

In order to minimize safety-related risks, the American Captain undergoes a long and intensive training program. He begins his training and exposure to American's techniques, procedures, and equipment as a Flight Officer. As such, he receives training and day-to-day experience with American's aircraft. He is responsible for managing and monitoring all major systems of the aircraft. The Flight Officer is also responsible for preflighting the aircraft. Additionally, he or she is exposed to American's inflight and cockpit procedures and discipline. Even though the Flight Officer's duties do not include flying the aircraft, [11] American considers, and the Court so finds, that the experience gained and the time spent in the position of Flight Officer is essential for American's future Captains.

After seven to ten years as a Flight Officer, the crew-member upgrades to the position of Co-pilot. As Co-pilot, the crewmember's duties include flying the aircraft with the Captain. The Co-pilot is second in command and has greater responsibility than the Flight Officer. Again, he or she receives valuable additional exposure to and training in American's procedures, equipment, routes, and cockpit discipline. In addition, he now spends considerable time at the controls of the aircraft. After seven to ten years as a Co-pilot, the crewmember is ready to upgrade to the position of Captain. The major

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[11] However, the Court notes, in the event of an emergency, the Flight Officer may indeed have to take command and fly the aircraft.

difference between the positions of Co-pilot and Captain is the added command responsibility, which is considerable. The Captain must make the decisions, whether it be a routine matter or an emergency situation.

All parties agree that experience is the key to continued or increased safety as a pilot advances in age. Plaintiff and the Department of Labor have attempted to show that experience flying in large military aircraft or helicopters is comparable or valuable experience for a commercial airline pilot. The Court does not agree. While such experience has some minimal value, the Court finds that the best experience an American Captain can have is flying for American Airlines. Indeed, safety of flight and minimization of risk to passengers and crew is enhanced to the greatest extent by having Captains who have as much of that experience as possible. The Court finds that such experience is reasonably necessary to the essence of American's business, the safe transportation of airline passengers from one point to another. Since this experience cannot be acquired unless American's hiring policy is maintained, the Court finds that age of less than forty at time of hiring is also reasonably necessary to the essence of American's business. *Diaz, supra* at 388.

The Court finds it equally clear that elimination of American's hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice. *Hodgson* v. *Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied sub nom., Brennan* v. *Greyhound Lines, Inc.*, 419 U.S. 1122 (1975). *See also Spurlock* v. *United Airlines*, 475 F.2d 216, 219 (10th Cir. 1972). Indeed, as the Fifth Circuit said in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224, 238 (5th Cir. 1976):

> We emphasize safety in busing just as we would in a variety of other industrial areas where safety to [third parties and] fellow employees is of such humane importance that the employer must be afforded substantial discretion in selecting specific standards which, if they err at all, should err on the side of preservation of life and limb.

The evidence indicates, as stated above, that "pilot error" accounts for 90% of all aviation accidents. There is credible and persuasive

evidence that the incidence of aviation accidents decreases as the age of the pilot increases. The Court finds that this phenomenon of reduced accidents with increase in pilot age is clearly a function of the amount of experience acquired by the pilot. As an *active* airline pilot advances in age, he necessarily acquires increased flying experience. Indeed, as demonstrated by credible and persuasive evidence, older pilots have fewer accidents than younger pilots. As already indicated, the Court has found that the *best* experience an American Captain can have is acquired by flying American aircraft in American's three cockpit positions. Under American's present hiring policy, a fifty-five to fifty-nine year old American Captain has been flying as an American Captain for at least ten to fifteen years. In addition, he spent approximately eight years in each of the other two cockpit positions as Co-pilot and Flight Officer. It seems clear that the safest Captain is not an American Captain who first assumes that position at age fifty-five to fifty-nine, but an American Captain who has the depth of experience that is the result of ten to fifteen years flying *as a Captain* for American. The Court concludes that if American were to hire pilots above the age of forty at time of hiring, it would not be possible for them to acquire this essential experience before they are forced to retire by the FAA age 60 rule. Therefore, the Court finds that American had a factual basis for believing that all or substantially all pilots of an age above forty at the time of hiring would be unable to perform safely and efficiently the duties of the job involved. *Weeks* v. *Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969).

In accordance with the foregoing, the Court finds that an age of less than forty at time of hiring is a bona fide occupational qualification for pilot applicants at American Airlines. In some cases, the individual interest in being free of employment discrimination on account of age must give way to the societal interest in having the safest air transportation system possible. Congress recognized that such a situation might exist and, for that reason, created the BFOQ exception to the general statutory prohibition against age discrimination. It seems clear that American's hiring policy furthers the strong public interest in achieving the safest aviation industry possible. American should

be able to apply a reasonable general rule in order to minimize the risks of the disastrous consequences of an airline accident. The Court concludes that American's hiring policy implements such a rule.

In accordance with the Court's finding that age under forty at the time of hiring is a BFOQ for the position of Flight Officer at American, plaintiff's complaint will be dismissed and judgment will be entered for defendant American. Furthermore, the Court's resolution of the final issue, whether plaintiff would be entitled to relief whether or not discriminated against on the basis of age, also mandates this result.

E. The Evidence Indicates That Plaintiff, Whether Or Not Discriminated Against On the Basis Of Age, Is Not Entitled To Any Relief.

American contends that since the evidence indicates that it would not have hired plaintiff in any event, plaintiff could not have been injured by any alleged age discrimination and consequently is entitled to no relief. The Court concurs.

In *East Texas Motor Freight* v. *Rodriguez*, 431 U.S. 395 (1977), the Supreme Court was confronted with a suit by Mexican Americans challenging a policy which prohibited transfer, within the trucking company, from city to line driver positions. The Court observed:

> The District Court found upon abundant evidence that these plaintiffs lacked the qualifications to be hired as line drivers. Thus, they could have suffered no injury as a result of the alleged discriminatory practices . . .

431 U.S. at 403-04. The Court further emphasized:

> Even assuming arguendo, that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents had not been injured because they were not qualified and would not have been hired in any event.

431 U.S. at 403 n.9. *See also International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 369 n.53 (1977); *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 285-87 (1977). Here, American has persuasively shown that plaintiff

is not entitled to relief, because it would not have hired him in any event.

The first stage of American's application process consists of an initial review of the written application. Plaintiff's application has never been considered beyond this point. Even if his application had received favorable consideration at this stage, however, it is clear from credible and persuasive evidence that plaintiff would not have been selected during the later stages of the pilot selection process. Included in these later stages are two medical examinations, interviews by the Manager of Pilot Recruitment and a panel of American pilots, a psychological test, a verification of the information contained in the written application, and a simulator evaluation ride.

In approximately June of 1977, plaintiff was hired as a pilot by Sis-Q Corporation ("Sis-Q"). Sis-Q is a California corporation which operates one daily roundtrip between Livermore, California, and various points in Nevada. This flight is made with a F-27 aircraft, which is owned by Livermore Laboratory. [12]

Sis-Q has a contract with Livermore Laboratory which requires it to provide pilots and maintenance for the F-27, a plane with two pilot positions in the cockpit. The contract also requires 1) Sis-Q pilots to be type-rated by the FAA in the F-27, [13] 2) Sis-Q pilots to use Part 121 standards, [14] and 3) Sis-Q to complete the training and type-rating certification of a new pilot within forty days of the hiring date of that pilot. If a new pilot is not type-rated within that period, he must, under the contract, be terminated.

Plaintiff was selected from approximately 200 applicants and received the same basic training as other newly hired pilots receive at

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[12] The F-27 is a two-engine turboprop aircraft that has a capacity of 40 passengers.

[13] A type-rating in an aircraft simply means that the FAA has certified that the pilot in question is qualified to fly that particular kind of aircraft.

[14] Part 121 of the Federal Aviation Regulations. 14 C.F.R. § 121 (1979). These are the same standards used by scheduled air carriers, including American.

Sis-Q. He was sent to a ground school for the F-27, [15] and, as part of that ground school training, received flight simulator [16] instruction in an F-27 simulator located at Allegheny Airlines in Pittsburg, Pennsylvania. Plaintiff received three training sessions in the simulator. He then volunteered for an FAA check ride, which was administrated by an FAA inspector who graded his ability to perform certain routine and emergency procedures in the simulator.

Plaintiff failed this check ride. The FAA inspector rated plaintiff deficient in several categories. First, he was unable to perform a simple "Preflight Inspection", despite the fact that a checklist is provided for this procedure. The purpose of the Preflight Inspection is to enable a pilot to determine whether the aircraft is safe to fly. Second, plaintiff was rated unsatisfactory in the category of "Other Instrument Approaches", which tests his ability to make a variety of instrument approaches, many of which are commonly utilized in the airline industry. Third, plaintiff was graded unsatisfactory in the "Steep Turns" category. Fourth, plaintiff was graded unsatisfactory in "Area Departure and Arrival", in part because he failed to lower the landing gear while landing. Credible testimony described this particular shortcoming as a "fatal" error.

Other categories in which plaintiff was rated unsatisfactory include, "Approaches to Stalls," [17] "Normal and Abnormal Procedures," [18] and "Emergency Procedures." During the "Emergen-

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[15] At ground school, a pilot is generally in a classroom environment where he learns the basic systems, including, for example, the mechanical, hydraulic, and electrical systems of the particular aircraft.

[16] A flight simulator is a mechanical device that simulates, as closely as possible, the environment, systems, and flight of the particular aircraft.

[17] The "Approaches to Stalls" category tests the ability of the individual to recognize when the airplane is approaching a stall configuration where it would literally cease to fly, and also tests the procedure which the individual must utilize to recover from this configuration.

[18] Normal procedures are the procedures that the pilot must perform to properly fly the airplane. Abnormal procedures are those procedures that are utilized when items of equipment fail, *e.g.*, generator failure, loss of an inverter, electrical problems, or hydraulic problems.

cy Procedures" portion of the check ride, plaintiff was tested on emergency landing procedures, no flap approach procedures, and getting the landing gear and flaps extended in emergency situations. Finally, plaintiff received an unsatisfactory score in the check ride category entitled "Judgment". According to credible testimony, "Judgment" is the ability of the individual to make the proper decisions at the proper time for the safety of passengers, crew and aircraft.

Plaintiff's simulator instructor at Allegheny, Captain Frank Burns, testified persuasively that plaintiff was a "below average" student, specifically, in the bottom 25% of all the students he had ever taught. Captain Burns was also present at plaintiff's FAA check ride and testified that plaintiff did "very poorly."

After his difficulties in the simulator, plaintiff returned to California for in-flight training, where he again experienced problems and was unable to perform satisfactorily. He was given additional training — more than the average Sis-Q pilot — in the hope that his progress would improve. It did not. Due to the forty-day time limit on pilot certification contained in Sis-Q's contract, plaintiff was scheduled for a certification ride in the F-27 with an FAA inspector. Plaintiff failed this in-flight check ride and was not certified by the FAA. Plaintiff was then terminated by Sis-Q due to his inability to receive FAA certification.

Shortly after his termination with Sis-Q, plaintiff was hired by Trans International Airlines ("TIA"), a supplemental charter, passenger, and air freight carrier. based in Oakland, California. Plaintiff was hired by TIA as a Co-pilot in a L-382 or C-130 aircraft. [19] After ground training, he was evaluated in a basic instrument procedures trainer, which, unlike a simulator which contains both flight instruments and other aircraft systems, is designed only to train and test basic instrument procedures. Despite the fact that the average TIA trainee receives only one chance to perform satisfactorily on the basic instrument evaluation ride, plaintiff was given three evaluation rides. His overall performance for each ride was unsatisfactory. Captain

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[19] L-382 is the civilian designation of the aircraft, while C-130 is the military designation. The aircraft is a four-engine turboprop cargo aircraft.

Tichacek, who personally observed and evaluated plaintiff's final ride, explained that plaintiff's performance was unsatisfactory overall for two principal reasons: first, plaintiff was very weak in basic instrument procedures; and, second, plaintiff did not exhibit good judgment.

The Court is cognizant of the fact that plaintiff's capabilities as a pilot were evaluated in terms of his ability to fly the F-27 and L-382 aircraft, neither of which is included in American's fleet. Nevertheless, the various categories of tests administered to plaintiff evaluate basic abilities which are required to fly any aircraft. Test categories such as "Preflight Inspection," "Area Departure and Arrival," "basic instrument procedures" and "Judgment" would seem to evaluate core capabilities of a pilot, regardless of the aircraft on which he is tested. Plaintiff's ability to perform even the most basic procedures, and his exhibition of poor judgment raise grave doubts as to whether he would have been hired by American if his application had progressed beyond the first stage of the selection process. His performance on these tests alone justify the conclusion that plaintiff would not have been hired by American absent any age discrimination.

Moreover, as evidence presented at trial indicates, plaintiff's lack of judgment is not something that has been observed only on isolated occasions, but rather, has been noted throughout plaintiff's entire career. An examination of plaintiff's Coast Guard record illustrates several examples of his lack of good judgment. In a Report on Fitness of the Officer ("RFO") covering the period from July 12, 1969, to January 31, 1970, his commanding officer observed that "his constant efforts to be original require monitoring by seniors". *See*, Defendant's Exhibit 35. The RFO covering the period from January 10, 1969, to July 11, 1969, noted that "his approach to assignments and problems is frequently unorthodox, with varying results." *Id.* The RFO covering the months between July 23, 1968, and January 9, 1969, described him as "a rather intense person, [who] has a tendency at times[s] to make quick decisions not always based on a thorough

review of the facts." *Id.* The RFO for the period from February 1, 1968, to July 2, 1968, made the following observations:

> His enthusiasm to attain certain goals has occasionally dulled his good judgment and he has followed unorthodox or non-standard procedures "to get the job done". When assigned duties for which he has personal enthusiasm, he completes same with perfunctory effort. . . . [H]is abuse of standard flight procedures in the HH-52A and inadequate performance as the president of a board of investigation caused me serious concern and several counseling sessions were conducted approximately two months ago.

While it is true that plaintiff's record also contains many references to the fact that he was well liked by his fellow officers and presented a good image to the public, American submits, and the Court agrees, that, in selecting persons who will eventually pilot aircraft carrying in excess of 400 passengers, more emphasis should be placed on an individual's judgment than on his affability.

The Court finds that plaintiff's Coast Guard record also raises strong doubts whether plaintiff would have been hired by American had his application progressed beyond the first stage of the selection process. The indications of poor judgment contained in this record alone justify the conclusion that plaintiff would not have been hired by American absent any age discrimination. While it is true that the FAA issued an airline transport pilot rating on the Boeing-727 aircraft to plaintiff on August 23, 1979, which the Court takes judicial notice of, this fact alone is not enough to overcome the credible and persuasive evidence presented by American concerning the likelihood that plaintiff would have been hired absent any age discrimination.

In sum, American has demonstrated to the Court's satisfaction that plaintiff would not have been hired whether or not discriminated against on the basis of age. Under the rationale of *East Texas Motor Freight* v. *Rodriguez, supra,* the Court concludes that the plaintiff has suffered no injury and is not entitled to any relief under ADEA.

IV. Conclusions of Law

1. This Court has jurisdiction over this action under the Age discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 626.

2. Plaintiff has established a *prima facie* case of discrimination on the basis of age under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.*

3. Age of less than forty at time of hiring is a bona fide occupational qualification for the position of Flight Officer at American Airlines, Inc., under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 623(f)(1).

4. Plaintiff is not entitled to any relief under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.*

V. Conclusion

In accordance with the foregoing, the Court finds that although plaintiff has established a *prima facie* case of discrimination on the basis of age, age below forty at time of hiring is a bona fide occupational qualification for the position of Flight Officer at American Airlines, Inc., within the meaning of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 623(f)(1). Furthermore, defendant has established that plaintiff would not have been hired in any event, whether or not discriminated against on the basis of age; therefore, plaintiff is not entitled to any relief. Accordingly, the Court dismisses plaintiff's action and enters judgment for the defendant. An order and judgment in accordance with the foregoing will be issued of even date herewith.

/s/ _____

CHARLES R. RICHEY
Charles R. Richey
United States District Judge

Date: November 8th, 1979

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1217

EDWARD L. MURNANE,

Plaintiff,

RAY MARSHALL, SECRETARY, UNITED STATES DEPARTMENT OF LABOR,

Plaintiff-Intervenor,

v.

AMERICAN AIRLINES, INC.,

Defendant.

ORDER

FILED Nov. 8, 1979

Upon consideration of the entire record herein, and in accordance with the memorandum opinion of even date herewith, it is, by the Court, this 8th day of November, 1979,

ORDERED, that plaintiff's action against the defendant shall be, and the same hereby is, dismissed; and it is

FURTHER ORDERED, that judgment in this action shall be, and the same hereby is, entered for the defendant American Airlines, Inc.; and it is

FURTHER ORDERED, that plaintiff's Motion to Take Judicial Notice shall be, and the same hereby is, granted pursuant to Rule 201 of the Federal Rules of Evidence.

/s/ _____
CHARLES R. RICHEY
Charles R. Richey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1217

EDWARD L. MURNANE,

Plaintiff,

RAY MARSHALL, SECRETARY, UNITED STATES DEPARTMENT OF LABOR,

Plaintiff-Intervenor,

v.

AMERICAN AIRLINES, INC.,

Defendant.

ORDER

FILED Dec. 18, 1979

This case is before the Court on plaintiff's Motion for Rehearing, defendant's opposition thereto, and plaintiff's reply. On November 8, 1979, the Court entered a Memorandum Opinion and Order in this age discrimination action granting judgment to defendant, dismissing plaintiff's complaint, and finding, *inter alia,* 1) age of less than forty years at time of hiring is a bona fide occupational qualification (BFOQ) for the position of Flight Officer at American Airlines, Inc., under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 623(f)(1) (1976); and 2) under the rationale of *East Texas Motor Freight v. Rodriguez,* 431 U.S. 895 (1977), plaintiff had suffered no injury and was not entitled to any relief under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* (1976).

Plaintiff contends the Court "erred as a matter of law" in reaching both of these decisions. Plaintiff asserts, for the first time in this litigation, that the BFOQ issue is controlled by the Airline Deregulation Act of 1978 ("ADA")[1], which, it is claimed, directly conflicts

[1] Pub. L. No. 95-504, 92 Stat. 1705 (Oct. 24, 1978).

with the Court's finding on this issue.[2] According to plaintiff, § 43(d)(1) of the ADA, 49 U.S.C.A. § 1552(d)(1) (West Supp. 1979), effectively prevents age from being a bona fide occupational qualification in the commercial airline industry. In addition, plaintiff claims the Court erred in finding that plaintiff was not entitled to any relief, whether or not discriminated against on the basis of age. Accordingly, plaintiff contends that: 1) judgment in this action, entered November 8, 1979, should be vacated, 2) judgment should be entered for plaintiff, 3) back pay, liquidated damages, costs and attorney's fees should be awarded to plaintiff, and 4) defendant should consider and test plaintiff for the position of Flight Officer at American Airlines, Inc. For the reasons set forth below, the Court denies plaintiff's motion.

Plaintiff contends the following provision of the ADA controls the determination of the BFOQ issue:

> Each person who is a protected employee of an air carrier which is subject to regulation by the Civil Aeronautics Board who is furloughed or otherwise terminated by such an air carrier (other than for cause) prior to the last day of the 10-year period beginning on October 24, 1978 shall have first right of hire, regardless of age, in his occupational specialty, by any other air carrier hiring additional employees which held a certificate issued under section 1371 of this title prior to October 24, 1978. Each such air carrier hiring additional employees shall have a duty to hire such a person before they hire any other person, except that such air carrier may recall any of its own furloughed employees before hiring such a person. Any employee who is furloughed or otherwise terminated (other than for cause), and who is hired by another air carrier under the provisions of this subsection, shall retain his rights of seniority and right of recall with the air carrier that furloughed or terminated him.

49 U.S.C.A. § 1552(d)(1) (West Supp. 1979).

The Court notes at the outset that this is the first time in this litigation that plaintiff has advanced this argument. Plaintiff states

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[2] Plaintiff-intervenor Ray Marshall, Secretary, United States Department of Labor, joins in this claim. *See* plaintiff-intervenor's Memorandum in Support of Plaintiff's Motion for Rehearing, filed December 6, 1979.

that the ADA was previously "overlooked," and asserts no persuasive reason for such lack of diligence on his part. Under Rule 59, Fed. R. Civ. P., it is unmistakably clear that rehearings are not to be granted solely to permit the losing party to present arguments or theories which could, and should, have been presented at trial, but were not. *Grumman Aircraft Engineering Corp. v. Renegotiation Board,* 482 F.2d 710, 721 (D.C. Cir. 1973), *rev'd on other grounds,* 421 U.S. 168 (1973); *Eschevarria v. United States Steel Corp.,* 392 F.2d 885, 892 (7th Cir. 1968). Accordingly, it is apparent that most of plaintiff's contentions need not be considered by the Court. Nevertheless, the Court has considered plaintiff's principal contentions on their merits, and finds them unpersuasive.

Initially, it is evident that the ADA offers no protection to plaintiff because he is not a "protected employee" thereunder. *See* 49 U.S.C.A. § 1552(h)(1) (West Supp. 1979). Plaintiff concedes this, but argues that § 43(d)(1) of the ADA, 49 U.S.C.A. § 1552(d)(1) (West Supp. 1979), conflicts with the logic of the Court's findings on the BFOQ issue. The Court disagrees.

Section 5(a) of the ADA clearly indicates Congress intended that implementation of the legislation should result in "no diminution of the high standard of safety in air transportation attained in the United States on October 24, 1978," 49 U.S.C.A. § 1307(a) (West Supp. 1979). The underlying rationale of the Court's findings on the BFOQ issue is the paramount importance of safety in the commercial airline industry. The Court found that American's hiring policy with respect to pilot-applicant age allows future Captains to acquire extensive flight experience. Moreover, the Court concluded upon persuasive and credible evidence that such experience is essential to the safe operation of American's business. The Court finds it without doubt that the elimination of American's hiring policy with respect to pilot-applicant age, as violative of § 43(d)(1) of the ADA, would indeed result in a "diminution of the high standard of safety in air transportation attained in the United States."

There is no indication in the legislative history [3] of the ADA that Congress considered the interplay between the provisions of the ADA and the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq*. Certainly, Congress intended to preserve any age requirements that amount to safety-related bona fide occupational qualifications under law existing on October 24, 1978. The Court finds that § 43(d)(1) of the ADA, 49 U.S.C.A. § 1552(d)(1) (West Supp. 1979), must be read to require any "protected employee," seeking to exercise the first right of hire, to satisfy any bona fide occupational qualifications established by the hiring air carrier. *See*, Airline Employer Protection Program, Proposed Rules, 44 Fed. Reg. 19146, 19150 (March 30, 1979) (to be codified in 20 C.F.R. § 638.11(b). Only this interpretation preserves the important occupational qualifications required in the interest of air safety. Accordingly, the Court finds no conflict between § 43(d)(1) of the ADA and the finding that age below forty years at time of hiring is a bona fide occupational qualification for the position of Flight Officer at American Airlines, Inc.

Plaintiff also challenges the Court's finding that plaintiff suffered no injury and is entitled to no relief, whether or not discriminated against on the basis of age, because American would not have hired him in any event. In doing so, plaintiff reargues several issues which were before the Court at time of trial. The Court need not, and will not, reconsider these issues. *Grumman Aircraft Engineering Corp. v. Renegotiation Board, supra; Eschevarria v. United States Steel Corp., supra*. However, plaintiff contends the court is "mistaken on a fundamental matter of law" and urges that plaintiff is entitled to back pay and liquidated damages whether or not he is entitled to injunctive relief. The Court recognizes that under certain circumstances, an injured plaintiff who is not entitled to injunctive relief may still be entitled to back pay and liquidated damages. *Rodrigues v. Taylor*, 569 F.2d 1231 (3rd Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561 (8th Cir. 1977), *cert. denied*, 434 U.S. 966 (1977). Such circumstances, however, are not present in the instant case.

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[3] The legislative history and purpose of the ADA is collected at 1978 U.S. Code Cong. & Ad. News 3737.

The Court has re-examined the evidence on the relief issue and reaches the same conclusion: plaintiff would not have been hired by American, whether or not he was discriminated against on the basis of age. The Court found that plaintiff's Coast Guard record *alone* justifies the conclusion that plaintiff would not have been hired by American. Clearly, aside from basic qualifications such as height, weight and education, plaintiff was *never* competitively qualified, at any age, for the position at American which he sought. Simply stated, plaintiff does not meet American's other qualifications on a competitive basis. Under such circumstances, plaintiff has suffered no injury. *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 403-04 (1977). It is obvious that one who has suffered no injury is not entitled to relief of any kind.

Accordingly, upon consideration of the entire record herein, it is by the Court, this 7th day of December, 1979,

ORDERED, that plaintiff's Motion for Rehearing shall be, and the same hereby is, denied.

/s/ _____
CHARLES R. RICHEY
Charles R. Richey
United States District Judge

AMERICAN AIRLINES

February 24, 1978

Mr. Henry Goichman
Consultant
Department of Industrial Relations
Fair Employment Practices
Commission
322 West First Street
Los Angeles, California 90012

Re: FEP 77-78, B4-949a
Edward Murnane

Dear Mr. Goichman:

This will acknowledge receipt of the referenced complaint.

Contrary to the assertion in the complaint that application took place in November 1977, Mr. Murnane applied for a pilot position with American Airlines in March and September 1976. A copy of his most recent application form is enclosed.

He was rejected in 1976 for lack of competitive qualifications.

He then filed a complaint with the United States Department of Labor under the federal Age Discrimination in Employment Act.

American was notified on May 9, 1977, that Mr. Murnane intended to sue under the federal law because of the rejection. A copy of that letter is enclosed.

American Airlines has met with the Department of Labor in its investigation. It was pointed out that one-third of Mr. Murnane's flying time is on helicopters, which is not recognized by American as prior flight time.

Dividing the remainder of his flying time by years of active flying results in an annual flying experience not competitive with that of other applicants for the pilot position.

Since Mr. Murnane was rejected for employment in 1976, his complaint filed with the California Commission on February 15, 1978 is not timely under Section 1421 of the Act.

I do not know whether Mr. Murnane contacted American again in November 1977 to re-confirm his earlier rejection. Even if that did occur it would not revive a stale complaint.

We respectively request that the Commission close this case because of timeliness and permit complainant to pursue the action he has instituted with the Department of Labor.

Very truly yours,

GLEN WALKER
Glen Walker
Attorney

Enclosure

Opposition

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Office - Supreme Court, U.S.
FILED
MAR 17 1982
ALEX

No. 81-1502

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EDWARD L. MURNANE,
Petitioner,

v.

AMERICAN AIRLINES, INC.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

GORDON DEAN BOOTH, JR.*
KILPATRICK & CODY
2501 M Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 833-8000
Attorney for Respondent

* Counsel of Record

March 17, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW *

Respondent respectfully disagrees with Petitioner's statement of the questions presented for review. Respondent submits that the only questions properly presented by this Petition are:

1. Did the courts below err in finding as a matter of fact that age less than 40 is a bona fide occupational qualification for the job of Flight Officer at American Airlines within the meaning of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621 *et seq.*?

2. Did the courts below err in finding as a matter of fact that Petitioner was not competitively qualified for the job of Flight Officer?

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* Respondent American Airlines, Inc. has the following subsidiaries or affiliates: Sky Chefs, Inc.; AA Training Corporation; AA Development Corporation; AA Energy Corporation; Americana Hotels; and Security '76 (divested in January 1980).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1502

EDWARD L. MURNANE,
Petitioner,

v.

AMERICAN AIRLINES, INC.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

In addition to the provisions of the Age Discrimination in Employment Act of 1967 cited by Petitioner, the following statutes and regulations are also relevant:

1. Section 601(b) of the Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 775, 49 U.S.C. § 1421(b), which provides in relevant part as follows:

> In prescribing standards, rules, and regulations, and in issuing certificates under this subchapter, the Administrator shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest . . . .

2. The "age 60 rule" adopted by the Federal Aviation Administration, 14 C.F.R. § 121.383(c) (1981), which provides as follows:

> No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.

STATEMENT OF THE CASE

The opinion of the District Court, Pet. App. 16a, adequately and accurately relates the facts of this case pertinent to this Petition. Restatement of those facts here would be repetitious and would burden this Court.

SUMMARY OF ARGUMENT

I. Contrary to Petitioner's assertion, there is no conflict either in principle or in decision between the holding of the courts below and the holding in *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303 (4th Cir. 1981). The District Court judged American's Bona Fide Occupational Qualification (BFOQ) defenses under the same test used in *Smallwood*, and the D.C. Circuit purported to use no different test. Even assuming *arguendo* that a different test was used, moreover, the test used differs from that urged by Petitioner only semantically in the context of safety-related BFOQs. In view of the District Court's findings, applying the Petitioner's test would not affect the result.

II. The BFOQ test urged by Petitioner has two "prongs", and the District Court found that American met them both. Before the D.C. Circuit, Petitioner attacked only the District Court's findings under the *first* prong, and hence the appellate court focused on this issue. Now before this Court, Petitioner asserts as error the D.C. Circuit's alleged failure to address the *second*

prong of the test. Because Petitioner failed to raise this point below, he cannot raise it here.

III. The decision below rested on two independent and sufficient grounds, only one of which is alleged to create a conflict among the circuit courts. Because of the second sufficient ground, a writ of certiorari should not issue.

IV. Regarding Petitioner's factual attacks on the decisions below, both the District Court and the D.C. Circuit concurred in the findings under attack, and hence under this Court's "two-court rule," a writ of certiorari should not issue.

ARGUMENT

I. No Conflict Exists Between the BFOQ Standard Applied by the Courts Below and the Standards Applied in Other Circuits

Petitioner errs in asserting that the District of Columbia Circuit applied a BFOQ standard different from the standard or standards applied in *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303 (4th Cir. 1981), and in decisions of the Fifth, Eighth, and Ninth Circuits.[1] Certainly the District Court below applied the "two-pronged test" devised in *Tamiami, supra* note 1, and urged here by Petitioner, Pet. App. 33a-34a, and this test was supported on appeal by *all* parties, *including American.* The

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[1] *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976); *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977), *on remand*, 627 F.2d 858 (1980); *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980). *But see Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975). American does not agree with Petitioner that the BFOQ tests formulated and applied in *Smallwood, Tamiami, McDonnell Douglas*, and *Pan Am* are identical, but, as discussed *infra*, American submits that the differences among the various tests, including the *Greyhound* test, are semantic only, at least in the present context.

appellate court did not reject this test, or purport to devise a new test; instead the court merely considered the key factual findings *raised on appeal by Petitioner* that were relevant to the BFOQ issue and then affirmed the ruling below.

The only support for Petitioner's argument that the D.C. Circuit adopted the "minimal increase in risk of harm" test is that court's passing reference to *Greyhound, supra* note 1, where the "minimal increase" test was first advanced. But nowhere did the D.C. Circuit ever use the phrase, "minimal increase in risk of harm"; to the contrary, the court merely affirmed the holding of the District Court that "American's hiring policies, including the age forty guideline, might result in the death of one less person than were American required to abandon or modify these policies," and then cited *Greyhound*. Pet. App. 8a. This hardly constituted an adoption of the *Greyhound* BFOQ test.

The differing results in *Smallwood* and in this case were due, therefore, not to differing legal standards, but to differing factual contexts. The hiring and crew progression policies of United differ from those of American in crucial respects; most significantly, United does not follow American's "up-or-out" policy, 661 F.2d at 308 n.7, a policy which together with American's age 30 hiring guideline, maximizes the experience of its Captains and hence maximizes safety. Pet. App. 5a-6a, 29a-34a. Thus the purported "conflict" between *Smallwood* and this case is fictitious and requires no resolution by this Court.[2] *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923).

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[2] The mere fact that different airlines have chosen different hiring practices in an effort to maximize safety, and that one is found insufficiently related to safety to constitute a BFOQ while the other is found sufficient, does not create a conflict requiring resolution. Such diversity among employers is desirable, and the courts have

Moreover, even if the D.C. Circuit did apply the *Greyhound* BFOQ test, Petitioner has not shown that the difference between *Greyhound* and *Tamiami* is other than semantic or that it was outcome-determinative in this case.[3] Thus, while in *Greyhound* and *Tamiami* the Seventh and Fifth Circuits applied semantically different BFOQ tests to maximum age requirements for the hiring of intercity bus drivers, both courts upheld the requirements on highly similar facts. Indeed, since compelling safety requirements may impact both prongs of the *Tamiami* test,[4] *Arritt v. Grisell*, 567 F.2d 1267, 1271 n.14 (4th Cir. 1977); *see Spurlock v. United Airlines, Inc.*, 475 F.2d 216, 219 (10th Cir. 1972), the results under either test will rarely *if ever* differ.

In the present case the same facts that sufficed for the D.C. Circuit court's BFOQ test (however Petitioner chooses to define it) also sufficed at the District Court for the two-pronged *Tamiami* BFOQ test. Therefore, *even if the Circuit Court did apply an incorrect test, the result would not be changed by applying the BFOQ test urged by Petitioner because the District Court has already*

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recognized the role of discretion in achieving safety-related goals. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 238 (5th Cir. 1976); Pet. App. 7a.

It is not the role of the ADEA to mandate uniform hiring standards for the airlines, and the courts lack the expertise to weigh the cost-benefit balance of safety measures where the risks are so great as here. Pet. App. 7a; *see Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978).

[3] *See Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670, 676 (9th Cir. 1980), and *Burwell v. Eastern Air Lines, Inc.*, 458 F. Supp. 474, 495-96 n.11 (E.D. Va. 1978), *aff'd in part and rev'd in part*, 633 F.2d 361 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981), noting the similarity in the "business necessity" and BFOQ tests in sex discrimination cases.

[4] Indeed, it was essentially for this reason that the *Greyhound* court refused to apply the two-pronged test of the Fifth Circuit to the case before it. 499 F.2d at 861-63.

found that American's age policies satisfy that test as well.

At this stage in the development of the law, the circuit courts should be allowed to experiment with different formulations of the BFOQ test, and intervention by this Court would be premature until experience under the differing formulations demonstrates that they in fact produce inconsistent results and hence that a need exists to choose among them.

II. Petitioner Did Not Raise in the Court of Appeals the Issue Raised Here as Petitioner's First Question Presented for Review

As the Court noted in *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958):

> Only in exceptional cases will this Court review a question not raised in the court below.

Here Petitioner asserts as error the D.C. Circuit's alleged failure to apply the second prong of the *Tamiami* test, *viz.*:

> Under the Age Discrimination in Employment Act, may a court hold that age less than 40 is a bona fide occupational qualification for hiring airline cockpit personnel without requiring the employer to prove that there is a factual basis for believing that all or substantially all persons within the class would be unable to perform safely and efficiently the duties of the job involved?

Petition at page i. As discussed above, the District Court did find both prongs of the *Tamiami* test satisfied, finding specifically under the second prong that "American had a factual basis for believing that all or substantially all pilots of an age of above forty at the time of hiring would be unable to perform safely and efficiently the duties of the job involved." Pet. App. 34a.

Petitioner did not challenge this finding on appeal, and instead attacked only the District Court's finding under the first prong, *i.e.*, that American's age policy was "reasonably necessary." Accordingly, this was the issue that occupied the appellate court's attention, see Pet. App. 5a-8a, and it is hardly surprising therefore that the D.C. Circuit did not expressly address the question now raised by Petitioner.

III. The Result in This Case Rested on Alternative Sufficient Grounds, One of Which Raises No Question for This Court, and Hence This Case Is Not a Proper Vehicle for Resolving Any Supposed Conflict Among the Circuits

The decision below rested on two findings, first that the over-forty requirement was a BFOQ, and second that the Petitioner was not in fact qualified for the position for which he applied. Because the second ground is an independent and sufficient basis for the result, the Court should not grant certiorari. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959) (dismissing writ of certiorari as improvidently granted where an independent ground supported the decision below and avoided the apparent conflict among the circuits); *see Jankovich v. Indian Toll Road Comm'n*, 379 U.S. 487, 489 (1965) (dismissing writ of certiorari because judgment rested on independent and adequate state ground); *Wilson v. Loew's Inc.*, 355 U.S. 597 (1958) (same).

The second ground is based on the principle that a plaintiff has no claim for illegal discrimination if he fails to establish that but for the alleged discrimination, he would have been hired. Pet. App. 8a-9a, *citing East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403-04 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 369 n.53 (1977); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 773 n.32 (1976); *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 284-87 (1977). Petitioner does not

contest this principle, but complains that the lower courts erred factually in concluding that Petitioner was unqualified. As appears in the following section, such alleged factual errors do not support the grant of a writ of certiorari.

IV. The Issues Raised by This Petition Are Purely Factual, and Are Not Sufficient for a Writ of Certiorari

The Supreme Court does not ordinarily intervene by writ of certiorari to review purely factual findings by the courts below. Thus in *Branti v. Finkel*, 445 U.S. 507 (1980), the Court held:

> In view of our settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred, we decline to review these and other findings of fact petitioner argues were clearly erroneous.

445 U.S. at 512 n.6; *accord, e.g., United States v. Ceccolini*, 435 U.S. 268, 273 (1978); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

> Certiorari is granted only "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."

NLRB. v. Pittsburgh S.S. Co., 340 U.S. 498, 502 (1951), *quoting from Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). The factual findings below of which Petitioner complains, regarding both the sufficiency of American's BFOQ defense and the lack of Petitioner's qualifications for the position sought, were concurred in by both courts below, and hence do not support a petition for a writ of certiorari.

In any event, Petitioner does not claim that the findings below were not fully supported by evidence in the

record, only that the trial court should have been persuaded by Petitioner's evidence rather than American's. Such weighing of the evidence is precisely the type of factual judgment eschewed by this Court on certiorari.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

GORDON DEAN BOOTH, JR.
Attorney for Respondent

Opposition

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No. 81-1502

In the Supreme Court of the United States

OCTOBER TERM, 1981

EDWARD L. MURNANE, PETITIONER

v.

AMERICAN AIRLINES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

MICHAEL J. CONNOLLY
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

QUESTIONS PRESENTED

1. Whether, under the Age Discrimination in Employment Act of 1967, an employer that defends its refusal to hire older applicants for jobs where safety considerations are involved must prove that age is in fact a bona fide occupational qualification.

2. Whether the district court, in concluding that petitioner would not have been hired in any event because he lacked competitive qualifications, improperly relied on evidence in records the employer did not have when it rejected petitioner and which it did not ask other applicants to provide.

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STATEMENT

Petitioner brought this suit alleging that respondent, American Airlines, Inc., had violated the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 623(a)(1), by refusing to consider him for employment because of his age. The Department of Labor intervened as plaintiff and was subsequently replaced by the Equal Employment Opportunity Commission.[1]

Petitioner applied to respondent on April 1, 1976, for a job as a flight officer, the entry-level cockpit position in a

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[1]The Equal Employment Opportunity Commission was substituted for the Department of Labor pursuant to Reorg. Plan No. 1 of 1978 (43 Fed. Reg. 19807 (1978)) and Exec. Order No. 12144 (44 Fed. Reg. 37193 (1979)) after the district court issued its opinions and prior to the appeal.

three-step line of progression that includes the first officer (co-pilot) position and culminates in the captain (pilot) position. He was 43 and had served as an aviator with the Navy and Coast Guard for 20 years, logging 7,340 hours of flight time (Pet. 2). Although he more than met respondent's stated qualifications (Pet. App. 26a), he was rejected by respondent in accordance with its unwritten policy of hiring only pilots aged 30 or under (Pet. App. 27a, 30a).

Respondent contended at trial that this policy was justified as a bona fide occupational qualification (BFOQ) within the meaning of Section 4(f)(1) of the ADEA, 29 U.S.C. 623(f)(1).[2] Respondent stated that it only hired pilots for the flight officer position who could become captains, because captains received valuable experience in the flight officer and first officer positions (Pet. App. 29a). American offered evidence to show that the abilities of pilots under age 60 deteriorate with age. It asserted that this deterioration is compensated for by experience as an American captain, so long as that experience begins in the pilot's mid-forties. Under the collectively bargained seniority system, it took an average of 16 years for a new hire to become an American captain; therefore, respondent's policy ensured that pilots would reach the captaincy in their forties.[3] Respondent argued that pilots hired as flight officers in their forties would be less safe, regardless of their previous

---

[2]Section 4(f)(1) provides in pertinent part:

> It shall not be unlawful for an employer, * * *
>
> (1) to take any action otherwise prohibited under subsection[] (a) [prohibiting refusal to hire because of age] * * * of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business * * *.

[3]Cockpit officers who fail to demonstrate ability to progress are terminated (Pet. App. 29a).

experience, because they would not become captains until their fifties, by which time their abilities would have declined due to the aging process. Respondent also argued that these pilots would not acquire "the requisite experience needed to maximize safety, before being forced to retire at age sixty by the FAA age 60 rule [14 C.F.R. 121.383(c)]" (Pet. App. 31a).

In upholding respondent's under 40 age requirement as a BFOQ for flight officers,[4] the district court relied solely on respondent's second argument and specifically refused to consider respondent's evidence that chronological age was related to a decrease in pilot ability (Pet. App. 6a n.4). Indeed, the district court found that "the incidence of aviation accidents decreases as the age of the pilot increases * * * [and that] this phenomenon of reduced accidents with increase in pilot age is clearly a function of the amount of experience acquired by the pilot" (Pet. App. 34a). It also found that "the best experience an American Captain can have is flying for American Airlines" (Pet. App. 33a). Since captains must step down when they reach age 60, the district court concluded that pilots hired over age 40 would never become the safest captains simply because they would not have a chance to serve as captains for as many years as those hired at a younger age.[5]

The district court held alternatively that petitioner's claim must be rejected under the rationale of *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977), because respondent demonstrated that petitioner

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[4]The district court analyzed the effect of the "age 30 guideline" on individuals over the age of 40 since the ADEA only protects individuals who are at least 40 but less than 65 (Pet. App. 30a n.10).

[5]The district court found that the safest captain was age 55-59 with "the depth of experience that is the result of ten to fifteen years flying *as a Captain* for American" (emphasis in original). Pet. App. 34a.

would not in any event have been hired absent the "age 30 guideline." The district court found that although petitioner met the basic qualifications for the flight officer position, he was not "competitively qualified" and that his deficiencies—which were not related to his age—would have come to light during the later stages of respondent's pilot selection process which included interviews, medical examinations, a psychological test, verification of application information and a flight simulator test. The court's conclusion was based on statements in petitioner's Coast Guard record concerning his judgment, and on evidence of his performance on flight simulator tests that were administered by other airlines after respondent had rejected him.

The court of appeals affirmed both district court holdings (Pet. App. 8a). In affirming the BFOQ holding, the court of appeals stated that "the airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated *most safely*. * * * Courts, in our view, do not possess the expertise with which, in a cause presenting safety as the critical element, to supplant their judgments for those of the employer" (Pet. App. 7a; citation omitted; emphasis in original). The court of appeals cited with approval the BFOQ test utilized by the Seventh Circuit in *Hodgson* v. *Greyhound Lines, Inc.*, 499 F. 2d 859, 863 (1974), cert. denied, 419 U.S. 1122 (1975), stating that "American's hiring policies, including the age forty guideline, might result in the death of one less person than were American required to abandon or modify these policies" (Pet. App. 8a). Relying on the undisputed fact "that the incidence of aviation accidents decreases as the pilot gains experience" (Pet. App. 5a) and the district court's opinion, unsupported by any specific evidence in the record, that "the *best* experience * * * is acquired by flying American aircraft" (Pet. App. 5a, 34a), the court of appeals concluded

that "by limiting its new hiring to relatively young pilots, American thereby ensures that the experience with American of its active Captains will be maximized. This * * * maximizes safety" (Pet. App. 5a-6a).

The court of appeals also affirmed the alternative ground for denying relief to petitioner, relying on *East Texas Motor Freight System, Inc.* v. *Rodriguez, supra* (Pet. App. 8a-9a).

ARGUMENT

1. The decision below exacerbates the pre-existing conflict in the circuits over the application of the BFOQ exception to the ADEA when the employer contends that its age requirement is justified by considerations of public safety. The majority of the circuits that have considered the question have concluded, as has the EEOC,[6] that even in that situation, the employer must "show (1) that the BFOQ * * * is reasonably necessary to the essence of its business * * * and (2) that the employer has reasonable cause, *i.e.*, a factual basis for believing that all or substantially all persons within the class * * * would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis." *Arritt* v. *Grisell*, 567 F. 2d 1267, 1271 (4th Cir. 1977), citing *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F. 2d 224, 235-236 (5th Cir. 1976); *Houghton* v. *McDonnell Douglas Corp.*, 553 F. 2d 561, 564 (8th Cir.), cert. denied, 434 U.S. 966 (1977); *EEOC* v. *County of Santa Barbara*, 27 Fair Empl. Prac. Cas. 1481, 1483-1484 (9th Cir. 1982).[7] A minority view, followed by the Seventh Circuit, is that the employer need only demonstrate "a rational basis in fact to believe that elimination of its

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[6]46 Fed. Reg. 47727 (1981).

[7]Cf. *Harriss* v. *Pan American World Airways, Inc.*, 649 F. 2d 670 (9th Cir. 1980), adopting the same BFOQ standard in a sex discrimination context.

maximum hiring age will increase the likelihood of risk of harm to its passengers." Although a "minimal" increase in risk is all that need be shown, the testimony of company officials alone is insufficient to establish the defense. *Hodgson* v. *Greyhound Lines, Inc.*, 499 F. 2d 859, 863 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975). While citing *Usery* v. *Tamiami Trail Tours, supra*, and *Hodgson* v. *Greyhound, supra*, the court below in fact established a third approach, concluding that "[c]ourts * * * do not possess the expertise with which, in a cause presenting safety as the critical element, to supplant their judgments for those of the employer" (Pet. App. 7a). Accordingly, the district court accepted respondent's argument that "the best experience an American Captain can have is flying for American Airlines" (Pet. App. 33a), even though there is no record evidence to support that conclusion.[8]

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[8]It appears that respondent's hiring policy was not based on empirical evidence. The airline admitted in an interrogatory that it did not possess any document, study, report, or investigation which supported its position that age was a BFOQ. This is directly contrary to the ADEA's policy against "the setting of arbitrary age limits regardless of potential for job performance" (Section 2(a)(2), 29 U.S.C. 621(a)(2)).

The empirical evidence at trial linked safety to experience in general, and the district court found on this evidence that "the incidence of aviation accidents decreases as the age of the pilot increases" (Pet. App. 34a). Respondent's position at trial was based on the claim that pilots age 40-60 deteriorate physically and mentally because of the aging process. Respondent argued in its post-trial brief that experience as a captain at American is necessary to offset this age-related deterioration and therefore "a new Captain who reaches that position in his late 50's *is not as safe* as a new Captain who reaches that position at age 45" (see American Airlines' Brief in Court of Appeals at 31-32). But, as the court of appeals emphasized, "[i]t is noteworthy to us that the district court did not premise his BFOQ determination on a finding that there exists a correlation between the increased chronological age of a pilot and his or her decreased ability to operate an aircraft in a safe manner" (Pet. App. 6a n.4). Nevertheless, both courts below concluded that, although individual pilots hired over age 40 perform safely, safety would be maximized if pilots as a class are younger when hired so that they will have the maximum experience at American and the maximum experience flying in the position of captain.

It has been suggested that there is an inverse relationship between the showing necessary to support an age restriction as a BFOQ and the degree of public risk involved (*Aaron* v. *Davis*, 12 Fair Empl. Prac. Cas. 1506, 1512-1514 (E.D. Ark. 1976); *EEOC* v. *County of Los Angeles*, 27 Fair Empl. Prac. Cas. 904, 909 (C.D. Cal. 1981)). Assuming, arguendo, that an airline's age restrictions in the hiring of flight personnel are entitled to the greatest deference, and thus that decisions involving other occupations are distinguishable, the decision below is nevertheless in conflict with a recent decision of the Fourth Circuit in *Smallwood* v. *United Air Lines, Inc.*, 661 F. 2d 303, 307-309 (1981), rejecting the BFOQ defense for a competing airline's age limitation on hiring for entry-level cockpit positions, because there was there, as here, "no significant evidence" to show that new hires over the age of 35 could not safely perform the job of flight officer (*id.* at 308).

In contrast, the decision below, in giving the employer "great leeway and discretion" when safety concerns are alleged, effectively relieves employers of the responsibility for basing their hiring policies on facts whenever safety is of the essence of their business. This abdication of judicial responsibility to enforce the statutory policy against stereotypical assumptions concerning the effects of aging is particularly inappropriate where, as here, respondent's unsupported allegations are used to justify a policy that concededly serves its economic interests (Pet. App. 8a n.6).

2. For the foregoing reasons, we agree with petitioner's contention that this case was wrongly decided, and presents an issue of considerable importance on which the circuits are in conflict. We nevertheless believe that the decision below rests on an adequate alternative ground; both courts below found that petitioner would not in any event have been hired by respondent, because he was not competitively qualified. Petitioner claims (Pet. 11-13) that this conclusion

was based on evidence not known to respondent when it rejected him, and that in considering this evidence the courts went beyond this Court's teachings in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 369 n.53 (1977); *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977); and *Franks* v. *Bowman Transporation Co.*, 424 U.S. 747 (1976). This claim is not insubstantial. Nevertheless, it raises essentially factual issues concerning the adequacy of the basis for the courts' conclusion about respondent's qualifications. As Justice Holmes pointed out for the Court in *United States* v. *Johnston*, 268 U.S. 220, 227 (1925), this Court does not grant certiorari to review evidence and discuss specific facts. See also *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 111 (1959) (Frankfurter, J., dissenting).

We note in addition that United Air Lines evidently intends to ask this Court to review the decision in *Smallwood*, (Pet. 8 n.4). *Smallwood* presents the same BFOQ issue under the ADEA as the instant case, and directly addresses arguments based on evidence of the physical effects of aging, which this case does not (see *supra*, note 8). Accordingly, *Smallwood* may be a better case in which to consider the conflict in the circuits on this issue.[9]

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[9]The Court may wish to defer action on this petition until the petition in *Smallwood* has been filed, and then consider the cases together.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

MICHAEL J. CONNOLLY
General Counsel
Equal Employment Opportunity Commission

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Petitioner's Reply Brief

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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PETITIONER'S REPLY BRIEF

EUGENE R. FIDELL*
MICHAEL F. MCBRIDE
LEBOEUF, LAMB, LEIBY & MACRAE
Suite 1100
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 457-7500
Attorneys for Petitioner
**Counsel of Record.*

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PETITIONER'S REPLY BRIEF

I.
THIS CASE AND *SMALLWOOD* CANNOT BE DISTINGUISHED

American Airlines, Inc. ("American") contends (p. 4 & n.2) that the decision below and the Fourth Circuit's ruling in *Smallwood* v. *United Air Lines, Inc.*, 661 F.2d 303 (4th Cir. 1981), are distinguishable because American has an "up or out" policy and United Air Lines ("United") does not. This contention is specious, and should be rejected.

American's attempted distinction is of no benefit to it, since Mr. Murnane — had he been hired when he applied at age 43 — would have had sufficient time to progress to captain (for which he already possesses the necessary licenses on two of American's four aircraft) and serve as such for several years. Pet. 4 n.1, 7-8 & n.3. Whether or not American's "up or out" policy

could justify exclusion of those who could *never* progress to captain, the policy has no bearing on this case. If this policy is a distinction, therefore, it is a distinction without a difference.

Although the court below found that American had an "up or out" policy while the Fourth Circuit found that United had none,[1] the differences between the two airlines' practices are more apparent than real. American requires its pilots to *qualify* for the seat appropriate to their seniority. Pilots may, however, bid for a more junior seat than that for which they have qualified. A pilot might "bid down" in this fashion in order to obtain preferred routes or schedules. For example, a pilot might well prefer for purely personal reasons to fly as a flight officer or copilot out of Los Angeles or San Francisco than as a captain out of Buffalo. J.A. 147. American's collective bargaining agreement states that "[a]ll pilots, regardless of bid status, may bid any pilot vacancy." Def. Ex. 6, § 23P1, Rep. App. 1a.[2]

Under the collective bargaining agreement, American may, with the consent of the pilot, withhold training for promotion to captain. *Id.* § 24C3d, Rep. App. 1a. A pilot who is required to qualify for the next higher cockpit position may defer that upgrade for as much as three years, and, once trained, must fly

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[1] In its rehearing petition, United advised the Fourth Circuit that it (like American) has an "up or out" policy. Whether or not United has such policy, it is clear that some airlines have one while others do not. *In re Airline "Age of Employee" Employment Practices Litigation*, 483 F. Supp. 814, 817 (J.P.M.D.L. 1980) (per curiam). If airlines with the same statutory duty of care as American find it possible to conduct business without such a policy, obviously such a policy is not "reasonably necessary" as required by the bona fide occupational qualification ("bfoq") provision of the Age Discrimination in Employment Act ("ADEA"). 29 U.S.C. § 623(f)(1) (1976). Thus, even if American were correct that its policy is materially different from those of other airlines, it merely defeats its own contention that its policy can form the basis for a bfoq defense.

[2] Extracts from the collective bargaining agreement are reproduced in the appendix to this Reply Brief, and cited as "Rep. App."

in the higher grade for only one year. *Id.* § 24C3e, Rep. App. 2a. Only if *no* pilot elects to upgrade to fill a particular vacancy may the airline assign a pilot to fill the position, but the collective bargaining agreement requires that such assignments be made "in *reverse* order of seniority." *Id.* § 24C3e6, Rep. App. 2a (emphasis added). Like American, United applies an inverse seniority system when mandatorily awarding a position for which no one has bid. 661 F.2d at 308 n.7. [3]

In short, whether a particular pilot actually flies in the higher American cockpit positions is very largely a function of the pilot's personal preferences. Worse yet, in those few instances in which American can compel a pilot not only to qualify, but actually to fly in a position higher than the one preferred by the pilot, [4] it is not the *more* experienced, but rather the *less* experienced pilot who would be forced into the higher job.

This review of the operation of American's personnel system demonstrates two things. First, it shows that the system functions in a manner that is, for all practical purposes, impossible to distinguish from those of other airlines that do not have an "up or out" policy. Second, it refutes American's assertion that its policies maximize pilot experience in the captain's seat. If it were truly "reasonably necessary" to do so (as the ADEA requires), American would never permit its pilots either to defer upgrade training, or to fly in a position junior to the one for which they are qualified. Rather, American would insist that all pilots fly at all times in the highest cockpit position available,

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[3] Further indication of the essential similarity of the two airlines' cockpit personnel programs is the fact that each currently employs airmen who occupy the third seat in the cockpit but will never fly as copilot or captain. Pet. App. 29a; 661 F.2d at 308. Thus, in neither case would a ruling in favor of the ADEA protected class lead to the creation of a new category of employee.

[4] American offered no evidence as to the frequency with which it exercises this prerogative.

regardless of their individual preferences. And in the rare case that the airline *forced* a pilot to fly as a captain or copilot, it would start with the more experienced pilots first, rather than using reverse order of seniority. American does none of these things, and hence its "up or out" policy does not justify discrimination in hiring.

Finally, it is important to bring American's effort to distinguish these cases into focus. Even if there had not been a contrary decision involving precisely the same job at a competing airline that uses many of the same aircraft, the conflict among the circuits concerning the legal standard to be applied to bfoq defenses cannot be dismissed as "semantic only" (p. 3 n.1). This conflict has manifested itself in both federal[5] and

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[5] *See* Pet. 9 n.5 (collecting cases). *See also Equal Employment Opportunity Comm'n* v. *County of Santa Barbara*, 666 F.2d 373, 376 (9th Cir. 1982) (following majority rule, rejects deferential standard applied in equal protection analysis and requires "factual evidence showing the impact of aging on one's ability to perform the tasks required"). Only recently, a different panel of District of Columbia Circuit endorsed the majority bfoq rule. *Stewart* v. *Smith*, No. 80-1340 (D.C. Cir. Mar. 9, 1982) (Wald, J.), slip op. at 12 n.26. The cited footnote is noteworthy for its revealing parenthetical summary of the holding in this case: "finding maximum hiring age rule for pilots justified by persuasive evidence that the best experience for higher level employees [*i.e.*, captains] was experience with the same company in entry level jobs [*i.e.*, flight officers]." The Court of Appeals evidently assumes that older hires would have less experience at American prior to reaching the captain's seat than would younger hires. American's collective bargaining agreement, however, establishes a seniority system under which no one can attain the more senior positions without first passing through the ranks. Pet. App. 29a-30a. As a result, everyone — including older hires — necessarily has the same "experience with the same company in entry level jobs" which the Court of Appeals understood to be "the best experience for higher level employees." The Court of Appeals is therefore obviously still laboring under precisely the misunderstanding we sought to correct below and which we pointed out on pages 10-11 of the petition.

state[6] cases, and the need for resolution by this Court is compelling, as shown by the EEOC's submission. That need is in no way obviated by insubstantial distinctions such as that proffered by American.[7]

II.
CERTIORARI SHOULD BE GRANTED IN THIS CASE

The Equal Employment Opportunity Commission states (p. 8) that the second question raised in the petition "is not insubstantial" in that the courts below "went beyond this Court's teachings" in three leading cases. Nevertheless, the EEOC

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[6] *E.g.*, *Peteet* v. *City of Palestine*, 620 S.W.2d 181 (Tex. Civ. App. 1981) (noting conflict on what employer must show to establish a bfoq; following majority rule); *Boynton Cab Co.* v. *Dep't of Industry, Labor & Human Relations*, 96 Wis.2d 396, 291 N.W.2d 850 (1980) (5-2) (following minority rule; potential jeopardy to life of "one more person" *held* sufficient basis for bfoq).

[7] American's second argument (pp. 6-7), that petitioner did not raise his first "Question Presented" in the Court of Appeals, is false. For example, page 34 of our opening brief to the Court of Appeals stated:

> Thus, American must show that its age limit is "reasonably *necessary* to the essence of its business" (emphasis added). American must also show that it has a "factual basis" for "believing that *all* or *substantially all* persons" (emphasis added) over 40 "would be unable to perform safely and efficiently the duties of *the job involved*" (emphasis added). American does not have such a "factual basis." [Footnotes omitted.]

The second prong of the two-pronged majority test for bfoqs was also addressed in our reply brief in the Court of Appeals.

American also states (p. 7) that the decision below found "that the Petitioner was not in fact qualified for the position for which he applied." This statement, too, is false. Mr. Murnane was found to possess American's stated qualifications to be a flight officer, Pet. App. 19a, 26a, but the courts below concluded (on the basis of the error identified in the second "Question Presented") that he lacked "competitive qualifications." Pet. App. 8a-10a, 27a, 47a. In this regard, American's opposition fails to address in any way the deficiency noted in footnote 8 of the petition.

claims that this question "raises essentially factual issues" and for that reason suggests that certiorari be denied or that the Court consider this case and *Smallwood* together.

The basis for EEOC's suggestion that certiorari should be denied is plainly wrong. To perceive this one need go no further than the EEOC's own second "Question Presented," which properly casts the "would not have been hired in any event" issue as a legal question. This Court need not decide *whether* Mr. Murnane would have been hired in any event, but merely what types of evidence the lower courts may consider in addressing such a defense. If the Court concludes — as we think it must — that the evidence in controversy should not have been considered or that other evidence was necessary to support the defense, the remedy will be to remand for further consideration. The case simply does not require the Court "to review evidence and discuss specific facts," as the EEOC contends (p. 8, *quoting United States* v. *Johnston*, 268 U.S. 220, 227 (1925)).[8]

The EEOC also suggests that "*Smallwood* may be a better case in which to consider the conflicts in the circuits on [the bfoq] issue" (p. 8; footnote omitted). The Court need not and

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[8] Interestingly, in *Johnston*, after making the disclaimer quoted in text, the Court, per Justice Holmes, proceeded to address the facts and reversed on the basis of that review. As explained by Justice Frankfurter in the other case cited by the Commission, the purpose underlying this Court's refusal to involve itself in almost all factual disputes is the need to permit the Court to "discharge its responsibility for the wise adjudication of cases 'involving principles the settlement of which is of importance to the public, as distinguished from that of the parties.' " *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 112 (1959) (Frankfurter, J., dissenting), *quoting Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Indeed, identification of the evidence an employer may or must introduce to carry the affirmative defense that an applicant "would not have been hired in any event" is arguably more important than the bfoq question, since it potentially affects all types of employment discrimination litigation. Pet. 9, 13-14.

perhaps should not choose between the two. An industry-wide pattern or practice is at issue, and the Court would be aided by having the views of several parties and a direct sense of the varied theories with which aviation employers choose to defend their pilot hiring age limits. The cases also reflect widely divergent levels of judicial scrutiny of employer bfoq claims. The marked contrast in the approaches of the two circuits lends weight to the notion that both cases should be afforded plenary review.

If a choice must be made, however, there are strong reasons to prefer this case. Here, the legal standard for ADEA bfoqs is squarely in issue. In contrast, United chose not to dispute the two-pronged bfoq standard in the Fourth Circuit. Accordingly, it has waived the right to do so in this Court. *E.g.*, *California* v. *Taylor*, 353 U.S. 553, 556 n.2 (1957). To this extent, and without suggesting that the requirements of Article III would not be met, the *Smallwood* case would lack an adversary presentation on the only issue that might make it worthy of review. The instant case is also to be preferred because the bfoq decision below rests only on management opinion, rather than empirical evidence. As a result, it would permit the Court to address the legal issue without becoming embroiled in detailed findings of fact. Finally, this case affords the Court a needed opportunity to police compliance with its prior decisions and to resolve the split among the circuits with respect to the second "Question Presented."

CONCLUSION

For the foregoing reasons, and those stated in the petition, a writ of certiorari should be granted. As suggested by the Solici-

tor General, the Court may wish to defer consideration of the petition pending submission of a petition in *Smallwood*.

Respectfully submitted,

EUGENE R. FIDELL*
MICHAEL F. MCBRIDE
LEBOEUF, LAMB, LEIBY & MACRAE
Suite 1100
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 457-7500
Attorneys for Petitioner
**Counsel of Record.*

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Appendix

Extracts From Defendant's Exhibit 6

AGREEMENT BETWEEN AMERICAN AIRLINES AND THE AIR LINE PILOTS IN THE SERVICE OF AMERICAN AIRLINES AS REPRESENTED BY ALLIED PILOTS ASSOCIATION

Effective April 1, 1977

* * *

§ 23

H. Qualification Of Successful Bidder

X-77 When a successful bidder fails to qualify within thirty (30) days from the effective date of bid, subject to weather, equipment availability, or extent of qualification requirements, to fill the vacancy for which he has been the successful bidder, he shall forthwith return to his former base station and bid status at his own expense. The vacancy that he failed to fill by failure to qualify over routes or on equipment shall then be proffered promptly to the next highest bidders, in the order of system seniority, on the list of bidders for that vacancy. All pilots are required to qualify in turn for the next higher pilot category.

* * *

P. General

1. All pilots, regardless of bid status, may bid any pilot bid vacancy.

* * *

§ 24C3

(d) With the consent of the pilot involved, the Company may withhold from training for promotion to first pilot a pilot who becomes entitled to such training at his base station by virtue of his seniority. . . .

* * *

(e) When a pilot is required to qualify in turn for the next higher pilot category as provided under Section 23H, such pilot at his option may defer his entitlement to upgrade from Flight Officer to Co-Pilot or Co-Pilot to Captain for a period of twenty-four (24) consecutive contractual months starting with the first month following the date he was first informed, in writing, that he was to upgrade.

(1) During such period of twenty-four (24) months if the Company extends additional entitlements to upgrade, such pilot may accept such entitlement to upgrade and cancel his option to defer.

(2) After the period of twenty-four (24) months of deferral, if the only trip selection such pilot could fly after he upgraded would be a reserve trip selection, such pilot may continue to defer his option to upgrade for an additional twelve (12) months.

(3) When such pilot has not upgraded after the deferral period of thirty-six (36) months, the Company may assign such pilot to upgrade training.

(4) When a pilot completes upgrade training in a category in which he has not previously been qualified, he may be required to select all trip selections, including reserve, in the category in which he received training for a period of twelve (12) contractual months following the date of his category qualification.

(5) A pilot who is assigned to upgrade training as provided in (3) above, and who by the exercise of his seniority is only able to get a reserve trip selection in his upgraded category, shall be pay protected for the trip selection of his choice in the next lower category, starting in the fourth (4th) contractual month of his 12 month lock in.

(6) If no pilot elects to upgrade in seniority in accordance with (e) above the Company may assign a pilot in reverse order of seniority at the base, and such pilot so assigned will be pay protected as in (5) above.

* * *

Supplement X

AGREED TO QUESTIONS AND ANSWERS CONCERNING THE BASIC AGREEMENT DATED APRIL 1, 1977

* * *

77. Q. ***Must A Pilot Progress From The Flight Engineer Seat To The Co-Pilot Seat And From The Co-Pilot Seat To The Captain's Seat?***

A. Yes. Section 23H Provides That Pilots Must Qualify In Turn For The Next Higher Pilot Position To Their Eventual Captaincy. But Under Section 24C3e, A Pilot May Defer His Entitlement To Upgrade.

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